Norris & Ivinson Arg'd N. St. C. Swayne

Oct. Term, 1877

Oct. 2. 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~324.~~ 64

EDWARD IVINSON, APPELLANT,

vs.

CHARLES H. HUTTON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WYOMING.

FILED DECEMBER 7, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 324.

EDWARD IVINSON, APPELLANT,

vs.

CHARLES H. HUTTON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WYOMING.

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1 Be it remembered that heretofore, to wit, on the 20th day of July, A. D. 1874, there was filed in the clerk's office of the supreme court of Wyoming Territory a transcript in the case of Edward Ivinson vs. Charles H. Hutton, in the words and figur's following, to wit:

2 Bill of complaint.

TERRITORY OF WYOMING,
Albany County, ss:

District court, first judicial district.

EDWARD H. IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

To the honorable J. W. Fisher, chief justice, and presiding judge of said district court:

Edward Ivinson, of Laramie City in said county of Albany, brings this his bill against Charles H. Hutton of the same place, and says:

That on the 6th day of September, A. D. 1872, your orator entered into a copartnership with the defendant, for the purpose of carrying on the business of stock and cattle raising in said county of Albany, and that certain written articles of copartnership were duly executed between them on that day.

That in pursuance of their said agreement your orator paid for and on account of their said copartnership, divers large sums of money amounting in all to about the sum of fifty-one thousand seventy-
3 five $\frac{65}{100}$ dollars, and during the time their said partnership continued, he received out of the funds belonging to said partnership to his own use, the sum of seven thousand two hundred and fifty-seven dollars.

And your orator further says, that on the eleventh day of April last the defendant and your orator mutually agreed to dissolve their said copartnership on the terms hereinafter set forth, and executed and delivered to each other all the deeds, mortgages, releases, notes of hand, and agreements necessary to complete and perfect their said arrangement.

That it was agreed by and between your orator and the defendant that your orator should release, assign and convey to the defendant all his rights, title and interest in and to all the partnership property of every kind and description, and that the defendant should repay to your orator all the sums of money he had advanced on account of their said copartnership, after deducting therefrom such sums as he had already received to his own use, and should pay him for the use of the money so advanced by your orator, and for the services by him
4 rendered said copartnership the further sum of five thousand dollars, and it was also further agreed that the defendant should pay or secure the payment of all debts or liabilities due and owing by said copartnership.

And your orator further alleges that the defendant and himself, at the commencement of their said copartnership by agreement between themselves employed A. G. Swain, the cashier of the bank in Laramie City, as their book'keeper, and that during the whole time of the continuance

of their copartnership he acted as such and kept all the books, papers, vouchers, and accounts of the partnership business.

That when your orator and the defendant agreed to dissolve their said copartnership, neither of them were well informed as to the exact state of the accounts, and neither of them undertook to ascertain from the books or papers in the clerk's hands, the exact balance that would be due to your orator according to the terms of their said agreement for a dissolution, but that they both agreed to leave the footing up of the accounts and the statement of the final balance to their said
5 clerk, and if any error was made they would mutually correct it, whenever it might be discovered.

That the said A. G. Swain, their clerk as aforesaid, gave them on a slip of paper, the figures $47,039.54, as the sum or amount which your orator was entitled to receive from the defendant under their agreement for a dissolution.

That both parties supposing that to be the correct amount, made, executed, and delivered each to the other on the said eleventh day of April, A. D. 1873, all the papers necessary to perfect and complete their said agreement.

That, on the evening of said day when their said clerk was posting up said partnership accounts and closing up the books of the firm, he discovered an error in the footing, as given your orator and the defendant, and by them used in drawing up the papers for the dissolution aforesaid, amounting to the sum of four thousand thirty-six dollars and twelve cents; and that, instead of $47,039.54, as given by him, the just and true balance due your orator from said defendant was $51,075.66.

6 That the said A. G. Swain at once informed each of said parties of the error or mistake so made by him, and of the just and true sum or amount due to your orator from the defendant; whereupon the defendant promised and agreed that he would re-examine said accounts, and would rectify any and all mistakes or errors that might be found therein, and would make it all right with your orator if he had not already done so (according to the agreement he had made with him before the execution of the papers aforesaid).

Yet the defendant, well knowing the premises, neglects and refuses to adjust, rectify, and settle said accounts according to his express promise, and as in equity and good conscience he is bound to do, but contriving to injure and defraud your orator, he sometimes pretends that the settlement by him made with your orator, and the papers by them executed and delivered at that time are good and valid at law, and will protect him, the said defendant, against any claim your orator may make for relief against the mistake above set forth.

Forasmuch, therefore, as your orator is without remedy by the
7 strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly cognisable, to the end that the plaintiff may have such relief as to equity and justice may appertain, and that the said defendant may answer the premises, but not upon oath or affirmation, the same being hereby expressly waived, and that an account may be taken by and under the decree and direction of this hon. court, so as to ascertain the exact and just amount due the plaintiff by the defendant on account of their late partnership business, in accordance with terms of their dissolution aforesaid, and that the agreements, releases, and other writings executed by this plaintiff and delivered to the defendant under the mistake and error above set forth may be corrected, amended, or cancelled, according to

the fact and truth of the case and as to justice shall appertain, and that the defendant may be decreed to pay to your orator said sum of $4,036.12,
with interest thereon, according to the terms of their said agree-
8 ment for a dissolution of partnership, and that the defendant may be compelled by the decree of this hon. court to perform specifically the agreement he made with the plaintiff, and pay him the just and true amount intended to be included in their terms of settlement, and that your orator may have such further or other relief as may be just,

And may it please your honor to grant to your orator a writ of subpœna, directed to the defendant, commanding him personally to appear before this hon. court, and then and there full, true, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this hon. court shall seem meet.

EDWARD IVINSON.

TERRITORY OF WYOMING,
Albany County, ss:

AUGUST 4TH, 1873.

Personally appeared before me, the above-named Edward
9 Ivinson, and made oath that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be on his information and belief, and as to those matters that he believes it to be true.

In witness whereof I have hereunto set my hand and official seal the day and year above set forth.

[NOTARIAL SEAL.] A. G. SWAIN,
Notary Public.

Endorsed on back as follows, viz.: "Bill in equity, 305. Edward Ivinson vs. Charles H. Hutton. Filed Aug. 5th, 1873. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy."

10 In the district court, first judicial district.

ALBANY COUNTY, *ss:*

AUGUST 4TH, 1874.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

The register of said court please issue a subpœna in the above entitled case, dated the day it is issued, returnable on Monday, the 18th day of Aug., instant, and requiring the defendant to appear and answer the bill on Monday, the 8th day of Sept. next.

J. W. KINGMAN,
Solicitor for Pl'ff.

Endorsed on back as follows, viz: "305. Edward Ivinson vs Charles H. Hutton. Application for subpœna. Filed Aug. 5th, 1873. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy."

11 *Subpœna.*

TERRITORY OF WYOMING,
County of Albany, ss:

To Charles H. Hutton:

We command you and each of you, in the name of the Territory of Wyoming, that on the third Monday after the date of the return hereof, to wit, on the 8th day of September, 1878, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our court of chancery, to a bill filed against you by Edward Ivinson, and that you do answer concerning such matters as are therein alleged against you.

And if you shall fail to appear and answer within the time hereinbefore required after service of this subpœna upon you, your default will be entered and the said bill will be taken as confessed and true, and a decree rendered accordingly. Returnable on the 18th day of August, 1873.

Witness my hand and the seal of our said court hereto attached, this fifth day of August, A. D. 1873.

[SEAL.] J. W. BRUNER,
Register in Chancery.
By J. W. MELDRUM,
Deputy Register.

12 TERRITORY OF WYOMING,
County of Albany, ss:

I hereby certify that I received the within subpœna in chancery on the 6th day of August, 1873, at 6 o'clock p. m., and served the same at Albany County aforesaid, on the 7th day of August, 1873, by delivering a certified copy thereof to Charles H. Hutton, the within-named defendant.

T. J. DAYTON,
Sheriff of Albany County.

(Indorsed:) Docket No. 305. Edward Ivinson vs. Charles H. Hutton. Subpœna in chancery. Filed Aug. 11th, 1873. J. W. Bruner, clerk. J. W. Meldrum, deputy. J. W. Kingman, pl'ff's att'y.

Sheriff fees.—Service, 50; mileage, 30; return, 25; copy, 30.—1.35.

13 In district court, first judicial district.

TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON, PLAINTIFF,
vs.
CHARLES H. HUTTON, DEFENDANT. } In chancery.

The demurrer of Charles H. Hutton, defendant herein, to the bill of complaint of Edward Ivinson, complainant.

This defendant, by protestation not confessing or acknowledging al[l] or any of the matters and things in the said complainant's said bill to

be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth that the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

14 Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

W. W. CORLETT,
Counsel for Complainant.

L. W. DOWNEY,
Solicitor for Compl't.

Endorsed on back as follows, viz: "305. Edward Ivinson vs. Charles H. Hutton. Demurrer to bill of complaint. Filed Sept. 6th, 1873. J. W. Bruner, clerk, by J. W. Meldrum, deputy. L. W. Downey, W. W. Corlett, solicitors for respondent."

15 District court, first judicial district, Sept. term, 1873.

TERRITORY OF WYOMING,
Albany County, ss:

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

The said plaintiff, by leave of court therefor first had and obtained comes now and amends his bill of complaint by striking therefrom, in the last line on the third page and the first and second lines on the fourth page thereof, the words "and if any error was made they would mutually correct it whenever it might be discovered." And also by striking out all the words in the eleventh, twelfth, and thirteenth lines on the fifth page of said complaint.

EDWARD IVINSON,
By his solicitor, J. W. KINGMAN.

Endorsed on back as follows, viz: "Edward Ivinson vs. Charles H. Hutton. Amended answer. Filed Sept. 10th, 1873. J. W. Bruner, clerk, by J. W. Meldrum, deputy. J. W. Kingman, pl'ff's solicitor."

16 In the district court of the 1st judical district.

TERRITORY OF WYOMING,
County of Albany ss.:

EDWARD IVINSON, COMPLAINANT,
vs.
CHARLES H. HUTTON, DEFENDANT. } In chancery.

The demurrer of Charles H. Hutton, defendant, to the amended bill of complaint of Edward Ivinson, complainant.

This defendant, by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be

true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth that the said complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

17 Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill or any of the matters and things herein contained, and prays to be hence dismissed with his reasonable cost in this behalf expended.

W. W. CORLETT,
Counsel for Defendant.

STEPHEN W. DOWNEY,
Solicitor for Defendant.

Endorsed on back as follows, viz: "Edward Ivinson complainant, ver's Charles H. Hutton, defendant. Demurrer to the amended bill of complaint. Filed Sept. 16, 1873. J. W. Bruner, clerk. By J. W. Meldrum, deputy. W. W. Corlett, counsel for defendant. S. W. Downey, sol. for defendant.

18 First judicial district, Sept. term, 1873.

TERRITORY OF WYOMING,
Albany County, ss:

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

Motion to strike the second general demurrer filed in this case at this term from the files.

And the said plaintiff comes now and moves the court here to strike the second general demurrer filed by the said defendant in this cause from the files, because it is not in accordance with the order of the court made in this case and because it raises no question except such as has been already passed on by the court.

EDWARD IVINSON,
By his solicitor J. W. KINGMAN.

Endorsed on back as follows, viz: "Edward Ivinson vs. Charles H. Hutton. Motion to strike 2nd demurrer from the files. Filed Sept. 16, 1873. J. W. Bruner, clerk. By J. W. Meldrum, deputy. J. W. Kingman, pl'ff's solicitor."

19 EXHIBIT A.

This agreement made and executed this eleventh day of April, A. D. 1873, by and between Charles H. Hutton, of the city of Laramie, in the County of Albany, in the Territory of Wyoming, of the first part, and Edward Ivinson, of the same Laramie of the second part witnesseth:

That whereas the said parties have heretofore been partners in business under the name and style of Hutton and Ivinson, according to the terms of certain articles of copartnership, made and executed on the 6th day of September, A. D. 1872.

Now, in consideration of the stipulations and payments hereinafter set forth, the said partnership is hereby dissolved by mutual consent and agreement, and said articles of copartnership cancelled and annulled and it is agreed that the said party of the second part shall release, assign, and convey to the said party of the first part, all his right and interest in and to all of the partnership property of every kind and description by proper instruments and conveyance in writing
20 duly executed and delivered.

And the said party of the first part hereby agrees to pay or secure to be paid to the said party of the second part, the sum of forty-seven thousand thirty-nine dollars and fifty-four cents, and in addition thereto, to pay, or secure the payment of all the debts and liabilities of said partnership, and to hold the said party of the second part wholly safe and indemnified against all said partnership debts and liabilities of every kind and description.

In witness whereof, we have hereunto set our hands and seals the day and year above written.

CHARLES H. HUTTON. [SEAL.]
EDWARD IVINSON. [SEAL.]

In presence of
L. W. DOWNEY.
A. G. SWAIN.

$7,257 00	cash received
100 00	" "
5,000 00	Metcalf agreement to furnish cash.
13,582 54	note due on or before Sept. 1st, 1873.
5,000 00	" on demand, secured by order on Co., due now.
5,000 00	" 30 days. " " " " " " 30 days.
2,000 00	" cash, Sargeant & Homer.
6,200 00	Bussard.
2,900 00	note on demand & agreement to pay in 30 days, signed by Hutton & L.
21	Fillmore.
$47,093 54	

The above amounts were received as per agreement.
A. G. SWAIN.

Signed in duplicate.

22 In district court, first judicial district.

TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON, COMPLAINANT,
versus
CHARLES H. HUTTON, DEFENDANT. } In chancery.

The answer of Charles H. Hutton, the defendant, to the amended bill of complaint of Edward Ivinson, complainant.

This defendant now, and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said amended bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for time to make answer unto, this defendant answering saith:

He admits that on the 6th day of September, A. D. 1872, the
23 said complainant entered into a copartnership with this defendant for the purpose of carrying on the business of stock and cattle raising in said county of Albany, and that certain written articles of corpartnership were duly executed between them on that day, as is alleged in the said complainant's said bill of complaint as amended.

This defendant furthe*ring* answering saith he admits that the said complainant, in pursuance of his said agreement with the defendant, paid for and on account of their said copartnership divers large sums of money, but as to the amount of such payments this defendant has no knowledge or remembrance, nor any information upon which he can form a belief, and as to that matter cannot state. This defendant further answering, saith he denies that the said complainant during the time the said corpartnership continued received out of the funds belonging to said copartnership to his own use the sum of seven thou-
24 sand two hundred and fifty-seven dollars only, but on the contrary this defendant alleges that during the continuance of said copartnership the said complainant received and drew out of the funds of said copartnership to his own use the full sum of sixteen thousand eight hundred and seventy and $\frac{25}{100}$ dollars.

This defendant further answering, saith he admits that on the eleventh day of April last the defendant and the complainant mutually agreed to dissolve their said copartnership, but denies that complainant and defendant so agreed to dissolve their said copartnership upon the terms set forth in the said complainant's said amended bill of complaint.

This defendant admits that the said complainant and this defendant upon said dissolution executed and delivered to each other all the deeds, mortgages, releases, notes of hand and agreements necessary to complete and perfect their arrangement for a dissolution of said copartnership.

This defendant further answering, admits that upon said dis-
25 solution it was agreed by and between the said complainant, and this defendant, upon the dissolution of their said copartnership, that the said complainant should release, assign, and convey to this defendant all his right, title, and interest in and to all the partnership property of every kind and description; but this defendant denies that it was agreed that this defendant should repay to said complainant all the sums of money he had advanced on account of the said copartnership, after deducting therefrom such sums as he had already received to his own use.

This defendant, further answering, denies that it was agreed upon said dissolution of co-partnership, or at any other time, that this defendant should pay to said complainant for the use of the money advanced by him on account of said co-partnership, and for the service by him rendered said co-partnership, or for any other consideration, the
26 further sum of five thousand dollars, or any other sum of money whatsoever; and this defendant admits, as charged in said amended bill of complaint, that it was further agreed between complainant and defendant upon the said dissolution of said co-partnership that this defendant should pay or secure the payment of all debts or liabilities due and owing by said co-partnership.

This defendant, further answering as to the allegations made in said bill respecting the terms upon which the said co-partnership between the complainant and this defendant was dissolved by the mutual agreement of the parties thereto, saith that the said terms of said agreement for such dissolution were all embraced and contained in a certain agree

ment and contract, which agreement and contract and all the terms, limitations, and conditions thereof were reduced to writing, and the same was duly signed, executed, and delivered between the complainant and this defendant, and which agreement and contract for the
27 dissolution of said co-partnership so executed, signed, and delivered was of the tenor of the exhibit hereto attached, and marked "Exhibit A"; and this defendant prays that reference may be made to said "Exhibit A," and that the same may be taken as a part of this defendant's answer herein.

This defendant, further answering, denies that the complainant and himself, at the commencement of said co-partnership, by agreement between themselves, employed A. G. Swain, the cashier of the bank in Laramie City, as their bookkeeper; but this defendant believes that during the whole or the greater part of the time of the continuance of said co-partnership, he, the said Swain, acted as such, and kept all the books, papers, vouchers, and accounts of the partnership business.

This defendant, further answering, saith he admits that when the complainant and the defendant agreed to dissolve their said co-partnership he was not well informed as to the exact state of the accounts, but as to whether or not the said complainant was so informed
28 this defendant does not know, but has reason to believe, and does believe, that he was so informed.

This defendant admits that at the time last mentioned he did not undertake to ascertain from the books or papers in the clerk's hands the exact balance that would be due to complainant, or any balance that would be due to the complainant according to the terms of the dissolution agreement, as set forth in said complainant's said amended bill of complaint; but as to whether this said complainant did so undertake this defendant does not know, and has no sufficient information to form a belief in relation thereto.

This defendant, further answering, denies that both complainant and defendant agreed to leave the footing-up of the accounts and the statements of the final balance to the said clerk or to anybody else.

This defendant further says he does not know or remember, and has no sufficient information to form a belief, as to whether or not the
29 said A. G. Swain gave complainant & defendant on a slip of paper the figures $47,039.54 as the sum or amount which complainant was entitled to receive from the defendant under their agreement for a dissolution; but this defendant says that the sum or amount indicated and expressed by the said character and figures was the true sum or amount which complainant was entitled to receive from this defendant under their agreement, as is shown by said agreement for a dissolution of said co-partnership, to which this defendant refers the court for proof thereof.

This defendant further answering, admits that on the said eleventh day of April, A. D. 1872, both executed and delivered each to the other all the papers necessary to perfect and complete their agreement for a dissolution of the said copartnership, but this defendant has no supposition as to the said figures constituting or being the correct amount of any thing or matter except the amount which the said complainant proposed to receive for his interest in said copartnership, and which this
30 defendant agreed and undertook to pay to the complainant, and as to what the complainant supposed in reference to said figures this defendant does not know and therefore cannot positively state, but he believes that said complainant supposed said figures to indicate precisely what this defendant supposed in reference thereto, as is shown

by the *the* written contract for a dissolution of said copartnership made and executed between the parties thereto.

This defendant further answering says he does not know and has no sufficient information to form a belief as to whether the said clerk on the evening of said day discovered any error in the footings as given to complainant and defendant, amounting to the sum of four thousand thirty-six dollars and twelve cents or any other amount, but this defendant avers that if such was the fact it was and is wholly immaterial, and this defendant only answers thereto in order that his answer may be full and complete.

This defendant further answering denies that the just and true
31 balance due to the complainant from the said defendant was $51,075.66 instead of $47,039.54, but this defendant protests that the averment as to that matter is wholly immaterial, and answers as to said matter alleged only that his answer may be full and complete.

This defendant further answering admits that the said A. G. Swain informed him that he had made a mistake in some manner in relation to the account of said copartnership, but that the said A. G. Swain could not explain his said alleged mistake to this defendant in a sufficiently intelligible manner to enable this defendant to understand what he meant, and this defendant denies that the said A. G. Swain informed this defendant of the just and true amount or sum due to the complainant from the defendant.

This defendant denies that he ever promised or agreed that he would re-examine said accounts and would rectify any and all mistakes
32 or errors that might be found therein, and would make it all right with the complainant if he had not already done so, but on the contrary this defendant alleges that the said agreement for the dissolution of the said copartnership was made upon a proposition of the said complainant which was accepted by this defendant without reference to the state of the accounts between complainant and defendant so far as the said agreement for a dissolution was concerned, which contract and all the terms thereof was reduced to writing by the parties thereto as herebefore stated.

This defendant further answering admits that he refuses and neglects to adjust, rectify, and settle said accounts for the reason that the same were fully adjusted and settled by the said agreement for the dissolution of said copartnership, but denies that he ever expressly or otherwise promised to adjust, rectify, or settle said accounts except as in and by the terms of said written agreement of the dissolution of said
33 copartnership, and the further papers executed and delivered in presence of and in consummating the said written agreement for said dissolution of said copartnership.

This defendant, further answering, denies that he is contriving to injure and defraud the complainant in the promises or in any way whatever, and alleges that since the conveyance to him by said complainant of the said partnership property he has conveyed or incumbered all of the personal property of said late copartnership to persons who purchased the same or interests therein, or obtained security upon the same in good faith for value, and without any notice of the pretended claim of the complainant to have the instrument by which the said property was conveyed to your said defendant, amended, corrected, or cancelled, and that since said last named time several parties have obtained judgments against this defendant in the county where the lands con-
34 veyed to defendant by complainant by the deeds mentioned in the said amended bill are situated, which judgments are unpaid, un-

satisfied, unreversed, and in full force against this defendant, and are a lien at law upon said lands.

And this defendant protests that this court has no jurisdiction either to compel the discovery or to grant the relief prayed for in the said complainant's said amended bill of complaint, and therefore prays that at the hearing of this cause the said bill may be dismissed.

And this defendant denies all and all manner of unlawful combinations and confederacy wherewith he is by the said amended bill charged, without this that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this defendant; all which
35 matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

CHARLES H. HUTTON,
Defendant,
By W. W. CARLETT,
Counsel for Defendant.

L. W. DOWNEY,
Solicitor, &c.

Endorsed on back as follows, viz: "Edward Ivinson, complainant, vs. Charles H. Hutton, defendant. Answer to amended bill of complaint. Filed Sept. 17, 1873. J. W. Bruner, register, by J. W. Meldrum, deputy. W. W. Corlett, counsel for defendant. S. W. Downey, sol. for defendant."

36 In the district court of the first judicial district.

TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON, COMPLAINANT, }
vs. }
CHARLES H. HUTTON, DEFENDANT. }

It is ordered, adjudged, and decreed by the court that this cause be, and the same is hereby, referred to Jason B. Brown, who is appointed special master in chancery of this court to take the proofs of the respective parties, that the said master cause to come before him all such witnesses as the respective parties may desire, and to examine the same on oath, and reduce their testimony to writing, and report the same to the court at the next term thereof with his findings thereon.

JOSEPH M. CAREY,
Judge.

TERRITORY OF WYOMING,
County of Albany, ss:

I, Jason B. Brown, do solemnly swear that I will faithfully per-
37 form the duties of special master in chancery in the case of Edward Ivinson, complainant, against Charles H. Hutton, defendant.

JASON B. BROWN.

Sworn to and subscribed to this 17th day of December, A. D. 1873.
[NOTARIAL SEAL.] STEPHEN W. DOWNEY,
Notary Public.

38 *Report of Jason B. Brown, special master in chancery.*

In the district court, first judicial district.

TERRITORY OF WYOMING,
Albany County:

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

To the honorable J. W. Fisher, chief justice and presiding judge of said district court:

I respectfully report that, in pursuance of an order of the hon. district court made in this case at the last term of said court, by which I was directed to take the proofs of the respective parties and examine on oath such witnesses as should come before me and reduce their testimony to writing, and report the same to the court at the next term, with my findings thereon, that, in pursuance of the said order of the court, on
39 the 17th day of December, A. D. 1873, at the office of J. W. Kingman, esq., in Laramie City, Albany County, Wyoming Territory, I caused the parties to come before me.

The plaintiff appeared in person and by J. W. Kingman, his attorney, and the defendant appeared in person and by W. W. Corlett and S. W Downey, his attorney, and having heard the counsel of the said parties and having examined and considered the evidence adduced by them respectively:

1st. I find and report that the plaintiff and defendant, on the 6th day of September, 1872, entered into copartnership by written articles of copartnership for the purpose of carrying on the business of stock and cattle raising in Albany County, Wyoming Territory.

2nd. I find and report that, on the 11th day of April, 1873, the plaintiff and defendant mutually agreed to dissolve said partnership; that said agreement to dissolve partnership was reduced to writing, and duly signed by the plaintiff and defendant; that by said written agree-
40 ment said partnership was dissolved, upon the following terms and conditions, viz:

That the said plaintiff was to release, assign, and convey to the defendant all his, plaintiff's right, title, and interest on and to all of the partnership property of every kind and description; that the defendant was to pay to the plaintiff, or secure to be paid, the sum of 47,039.54, and in addition thereto to pay or secure the payment of all the debts and liabilities of the partnership, and to save the plaintiff perfectly harmless on account thereof.

3rd. I find and report that, on the 12th day of April, 1873, the plaintiff, in pursuance of said dissolution agreement, conveyed to the defendant all the plaintiff's interest in the partnership property, and the defendant paid and secured to be paid to the plaintiff the said sum of 47,039.54.

4th. I find and report that, pending the negotiations for dissolution and before the dissolution contract was signed, it was agreed be-

41 tween the plaintiff and the defendant that the partnership should be dissolved upon these terms, viz:

That the defendant was topay to the plaintiff all sums of money that the plaintiff had individually advanced to the partnership. The defendant was to pay all sums of money that had been borrowed from the bank of Edward Ivinson by the plaintiff and the defendant. That the defendant was to pay to the said bank all the money he had individually borrowed from said bank, and also all sums of money that Harper & Co. owed said bank. In addition thereto, defendant was to pay plaintiff the sum of $5,000.00 as a bonus or profit for his, plaintiff's, interest in said partnership; defendant was also to pay all debts of the partnership, and indemnify the plaintiff against the same.

In consideration thereof plaintiff was to convey to defendant all his, plaintiff's, interest in the partnership property and business.

5th. I find and report that at the commencement of the part-
42 nership the plaintiff and defendant employed one A. G. Swain as their clerk and bookkeeper, and that the said Swain acted as such and kept all the books, papers, vouchers, and accounts of the partnership.

6th. I find and report that pending the negotiations for dissolution, and before the dissolution contract was signed, it was agreed between the plaintiff and the defendant that the footing up of the partnership accounts and the statement of the final balance should be left to their said clerk and bookkeeper, A. G. Swain, and the amount reported by him was to be accepted by them as the true and correct amount, and should be taken as the basis of settlement upon which said partnership should be dissolved.

7th. I find and report that neither the plaintiff nor the defendant were well informed as to the exact state of their partnership accounts or business, and that neither of them undertook to ascertain from
43 their partnership-books or papers the state of their partnership-accounts, but left that entirely to their said clerk.

8th. I find and report that A. G. Swain, their said clerk, cast up their partnership account, and found and reported to the plaintiff and the defendant that the amount due the plaintiff from the defendant, pursuant to their agreement to dissolve partnership, was 47,039.54, and that said Swain gave said amount on a slip of paper to J. W. Kingman, esq., who had been employed by plaintiff and defendant to draw up their dissolution contract, and that the said J. W. Kingman did draw the said dissolution contract, and put into it the said sum of 47,039.54, as reported to him by the said A. G. Swain—he as well as the plaintiff and defendant supposing it to be the correct amount.

9th. I find and report that the said A. G. Swain, in casting up the partnership books and accounts, made a mistake to the amount
44 4,036.12; that instead of 47,039.54 being the amount that defendant would owe plaintiff upon the partnership dissolution, and which was put into the dissolution contract, the true and correct amount was 51,075.66, and that amount should have been put into the dissolution contract.

10th. I find and report that soon after said mistake occurred, but not until after said written dissolution contract had been signed, the said A. G. Swain discovered he had made a mistake to the amount of 4,036.12, and so informed plaintiff and defendant, as well as their attorney, J. W. Kingman, esq.

11th. I further find and report that, pending the negotiations for dissolution, and before the written dissolution contract was signed, that it

was agreed between the plaintiff and defendant that if any error or mistake occurred in casting up the account was discovered, they would correct it, and make it all right as soon as it was discovered.

45 12th. I find and report that there is still due the plaintiff from the defendant on account of their partnership dissolution the sum of 4,036.12.

The defendant made many objections to the testimony offered, all of which will appear by reference to the testimony, and all of said objections I overrule.

And in conformity with the order of the court I herewith return the testimony taken and used by me, to wit, the testimony of Edward Ivinson, A. G. Swain, J. W. Kingman, C. H. Hutton, and S. W. Downey.

All of which is respectfully submitted.

JASON B. BROWN,
Special Master in Chancery.

JANUARY 12TH, 1874.

The fees of the special master in chancery in this case are fifty dollars.

JASON B. BROWN,
Special Master.

46 Endorsed on the back as follows, to wit: "E. Ivinson vs. C. H. Hutton. Report of special master. Filed Jan'y 21st, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy."

47 In the district court, first judicial district.

TERRITORY OF WYOMING,
Albany County, ss:

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

Jason B. Brown having been appointed a special master in chancery in the above-entitled case, took the oath required by law this 17th day of December, A. D. 1873.

J. W. Kingman, of counsel for the complainant, and W. W. Corlett and L. W. Downey, of counsel for the defendant, being present and agreeing to take the testimony in said case, the first witness offered by the plaintiff was A. G. Swain, who being duly sworn according to law, testified as follows:

48 (The defendant objects to any testimony being taken in the case on the grounds that there is no replication to the answer on file in the case, nor has there ever been any replication filed in said case, & for that reason objects to the taking of any testimony in the case.)

Q. 1. State whether you are acquainted with the parties to this suit and with the late firm of Hutton & Ivinson.

Ans. I am.

Q. 2. State whether you had any business connection with said firm, and, if so, what?

Ans. I was employed by Hutton & Ivinson to keep their books and accounts, and I did keep their books and accounts from September the 6th, 1872, until April 11th, 1873.

Q. 3. State, if you know, when said partnership was dissolved, and in what manner it was dissolved.

Ans. It was dissolved on the 11th day of April, 1873, by the mutual consent of both parties.

Q. 4. If you know, state the terms of their agreement for dissolution.

(The defendant objects to the foregoing question No. 4, upon the ground that it is incompetent and irrelevant one for the reason that the agreement for dissolution is in writing and signed by both parties, and that oral testimony cannot be heard to contradict or vary the said written agreement, and for the same reasons objects to the answer as well as the question.)

Ans. The terms of the agreement for dissolution was that M'r Hutton agreed to pay M'r Ivinson all sums of money that he (Ivinson) individually had advanced to the partnership, also such sums of money as had been borrowed from the bank of Edward Ivinson by Hutton & Ivinson. M'r Hutton was also to pay such sums of money as had been borrowed by himself from said bank, together with the amount owing to the bank by Harper & Co. In addition thereto said Hutton was to pay said Ivinson the sum of five thousand dollars as a profit or bonus for said Ivinson's interest in the partnership.

Said Hutton also agreed to pay all outstanding indebtedness of the partnership, and indemnify said Ivinson against the payment of said partnership debts. In consideration of the payment of these several sums of money it was agreed that M'r Ivinson was to transfer to the said Hutton all his, Ivinson's, rights, title, and interest in the cattle, sheep, horses, and mules, stallions, and jacks, and all the ranches conveyed by said Hutton to the said Ivinson at the commencement of their said copartnership; in other words, Ivinson was to transfer to Hutton all the interest he (Ivinson) had in all the partnership property then owned by Hutton & Ivinson.

It was also agreed that such sums of money as had been paid by the partnership to Ivinson as his share from sales of beef should be considered as a credit to Hutton in the settlement of their partnership business.

Q. 5. How was the balance of all these sums arrived at, and who figured up the amount?

(The defendant objects to the question and answer for the reasons that the same are incompetent, immaterial, and irrelevant.)

Ans. The balance of all these sums was arrived at from the books of Hutton and Ivinson and from the books and notes in the possession the bank of Edward Ivinson, and I figured them up myself.

Q. 6. State, if you know, who drew the papers to perfect this settlement between the parties.

(Defendant objects to the foregoing question and alleges it is immaterial.)

Ans. J. W. Kingman drew the papers.

Q. 7. Who were present when J. W. Kingman was instructed what papers to draw, and what instructions were given?

(Objected to both question & answer for the reason that the same is incompetent, irrelevant, and immaterial.)

Ans. M'r Hutton, M'r Ivinson, and J. W. Kingman and myself were all the persons I remember of being present. M'r Kingman received instructions to draw the necessary papers for the transfer of Ivinson's interest in the partnership property of Hutton & Ivinson. The papers Kingman were to draw were to be drawn in accordance with the agreement of Ivinson & Hutton to dissolve partnership, as I have stated in

my answer to question No. 4. The whole terms of the sale and dissolution were at that time stated to Judge Kingman.

(The defendant objected to the last sentence of the answer for the reason that the same is not responsive to the question.)

53 Q. 8. State what was said at that time in reference to the total amount to be paid by Hutton to Ivinson, and by whom it was said.

(Defendant objects to the question and answer as being incompetent, immaterial, and irrelevant.)

Ans. It was agreed by Hutton & Ivinson, the total amount not being known by them, that I should cast up the amount and furnish it to them and the party who was to draw up the papers. It was also agreed that should the amount as cast by myself be incorrect in any particular, that the same would be rectified by the parties interested.

Q. 9. Who gave the amount to be put into the papers, and what sum was given?

(Defendants object' to the question and answer as being incompetent, immaterial, and irrelevant.)

Ans. I gave the amount, and the amount given was forty-seven thousand and thirty-nine dollars & fifty-four cents ($47,039.54).

53½ Q. 10. State whether or not the books of Hutton & Ivinson were made up and all the accounts entered on them at the time you figured up said sum.

(Defendant objects to this question and answer for the same reasons given to the last question & answer.)

Ans. I am not positive, but think they were.

Q. 11. Did you make any further entries in the books of Hutton & Ivinson after that contract was executed; and, if so, when?

(Defendant objects to this question & answer for the same reasons given to the last question & answer.)

Ans. I do not think I made any entries in the books of Hutton & Ivinson after the contract.

Q. 12. State whether or not the amount of $47,039.54, as given

54 by you, was the correct amount according to their agreement.

(Defendant objects to the question and answer for the same reasons as given to last question & answer.)

Q. 13. It was not the correct amount.

Q. 14. When was the error discovered, and by whom?

(Defendant objects to question & answer the same as to the last question and answer.)

Ans. The error was discovered on Saturday, April 12th, 1873, by myself.

Q. 15. What was the true amount that should have been given by you according to the terms of their agreement?

(Defendant objects to this question and answer the same as to the last question and answer.)

Ans. The true amount was fifty-one thousand and seventy-five dollars & sixty-six cents ($51,075.66).

55 Q. 16. What did you do on discovering this error?

(Defendant objects to this question and answer the same as to the last question and answer.)

Ans. I immediately consulted with Judge Kingman to know what could be done to rectify it, and afterwards on the next day, Sunday, April 13, 1873, I spoke to M'r Hutton in relation to it in the presence of Judge Kingman; and M'r Hutton, on having the matter referred to him, said he was glad to have it in his power to rectify it, and if the

statement I made in regard to the error was correct he would make it all right; that he did not wish to defraud anybody of anything that he rightfully owed.

Q. 17. State whether or not at any time the several items making up the sum to be paid by Hutton to Ivinson were examined by Hutton & Ivinson and agreed to by them as items.

56 (Defendant objects to this question and answer the same as he did to the last question & answer.)

Ans. The first accounts as made up by me were not examined by them, but the settlement was made entirely on my figures. But after the error had been discovered the items were gone over by both Hutton & Ivinson, and no objection was made to any single item.

Q. 18. State the items fully that the parties agreed to, making up said sum of fifty-one thousand and seventy-five dollars & sixty-six cents ($51,075.66).

(Defendant objects to this question & answer for the same reasons given to the last question and answer.)

Ans. The items were as follows, to wit:

To cash paid Creighton by Ivinson, per ledger, page 4	$15,000 00
To cash paid into the firm by Ivinson, p'r ledger, page 4	8,773 34
57 To balance due Ivinson Bank by Hutton & Ivinson at time of settlement, per ledger, page 5	$10,138 16
To interest on the same	27 04
To note of Hutton & Ivinson, delivered to Hutton at time of settlement	3,820 83
To interest on the same	90 37
To note of Charles H. Hutton, delivered to Hutton by the bank	435 50
To interest on the same	25 80
To note Charles H. Hutton, delivered by the bank	4,328 06
To interest on the same	216 40
To balance of Harpers & Co.'s note, delivered by the bank	2,831 47
To interest on the same	388 69
To a bonus Ivinson was to receive	5,000 00
Total	$51,075 66

Q. 19. Was these all the items agreed by the parties to be included in their settlement, and was each of these items specially mentioned and agreed to?

(Objected to, both question & answer, the same as the last question & answer.)

58 Ans. These were all the items that were agreed to be included in the settlement. The items were not specially mentioned or agreed upon, but were left to me to cast and state the amount.

Q. 20. Have the parties at any time since the execution of the agreement examined and agreed to any of these items?

(Defendants object' to question and answer for the same reasons given in the case of the last question and answer.)

Ans. Both parties have since examined the items, and no objection was raised by either party.

Q. 21. How much was credited by Ivinson to Hutton in this settlement as money which he, Ivinson, had received out of the partnership?

(Defendant objects to the question & answer for the same reasons given in the case of the last question and answer.)

59 Hutton received credit for seven thousand two hundred and fifty-seven dollars ($7,257.00), which amount had been received by Ivinson out of the partnership.

Q. 22. State and explain how you made the error of four thousand

and thirty-six dollars and twelve cents in your first statement to the parties.

(Defendant objects to this question and answer for the same reason given in the case of the last question and answer.)

Ans. The error was made by taking the amount paid by Ivinson to Creighton from the books of the bank instead of the books of the partnership. It was caused as follows: At the time of buying into the partnership by Ivinson, he (Ivinson) gave his check on the Omaha National Bank of Omaha for $15,000 00 in favor of Edward Creighton or order. Upon learning of the transaction I charged up the amount
60 of $15,000 00 to Edward Ivinson's stock accounts, which was an account I opened at that time upon the books of the bank as amounts were paid by the firm of Hutton & Co. for beef sold to them by Hutton & Ivinson. Ivinson's half was paid directly to him (Ivinson) and credited on the stock account of said Ivinson on the books of the bank until the amount was reduced to $10,963.88, when said stock account of $10,963.88 was put into a note by said Ivinson in favor of the bank, and at the time of settlement or making up of the amounts due by said Hutton to said Ivinson, I, instead of taking the amount of $15,000.60, as originally paid into the partnership by Ivinson, *I* took the amount of $10,963.88, being the amount of the note due by Ivinson to the bank. The stock account I hear speak of was confined to the $15,000.00 Ivinson put into the firm of Hutton & Ivinson in the first instance, and the credits received by Ivinson.

Q. 13. What amount did Hutton pay or secure to be paid to M'r Ivinson on this settlemen? State the items.

61 (Defendant objects to the question and the answer to the same for the reason that it is immaterial, incompetent and irrelevant.)

Ans. M'r Hutton paid or secured to be paid the amount of $47,039.54. The items were:

By Ivinson's share of beef sold, and amount of his half of the Pacific market and slaughter house paid by Hutton & Co. and H. C. Metcalf	$7,257 00
By cash in hand	100 00
By Metcalf agreement to furnish cash	5,000 00
By Hutton's note due on or before Sept. 1, 1873	13,582 54
By Hutton's note on demand secured by order on the R. R. Co	5,000 00
By Hutton's note, 30 days, secured as above	5,000 00
By cash paid Sergeant & Homer	2,000 00
By trade to Bussard	6,200 00
By note on demand signed by Hutton and Fillmore	2,900 00
Total	47,039 54

Did the first item of $7,257.00 include all the money that Ivin-
62 son had ever received from the firm of Hutton and Ivinson?

(Defendant objects to the question & answer for the same reasons last given.)

Ans. It did.

The defendant, by W. W. Corlett and S. W. Downey, cross-examined the witness:

Q. 1. State whether or not you have given the terms of the agreement for dissolution from memory alone or from reference to any contract or memorandum.

Ans. My statements were made from memory alone as to the terms of dissolution. My figures were taken from memorandums.

Q. 2. State what memorando you took your figures from.

Q. 3. Partially from the contract of dissolution and partially from a memorandum made at the time of settlement.

63 Q. 4. State whether or not there was any written contract in relation to the terms of dissolution executed by the plaintiff and defendant.

Ans. There was.

Q. 5. State where that contract is if you know.

Ans. The contract was executed in duplicate, and one copy was delivered to M'r Ivinson, and one copy was delivered to M'r Hutton. I have one of the duplicates in my possession at this time; the one which was delivered to Ivinson.

Q. 6. Were you present when that contract was signed and delivered by the parties?

Ans. I was.

Q. 7. When & where was it signed and delivered?

Ans. My recollection is that the contract was signed and de-
64 livered in Ivinson's bank on the 12th day of April, 1873.

Q. 8. Name all the sums of money which Ivinson individually advanced to the firm of Hutton & Ivinson, if you know of your own knowledge.

Ans. Fifteen thousand dollars at one time; eight thousand seven hundred and seventy-three dollars and thirty-four cents at another time. The other advances I do not consider advances by him individually, but part of the loans from the bank to Hutton & Ivinson.

Q. 9. Name all the sums of money which had been borrowed from Ivinson's bank by Hutton & Ivinson, and which Hutton agreed to pay on the agreement for dissolution.

Ans. The balance of an open bank account between the bank and Hutton and Ivinson due the bank from them..... 10,138 16
Interest on it..... 27 04
Note of Hutton & Ivinson in favor of the bank..... 3,820 83
65 Interest..... 90 37

Q. 10. Name all the sums of money which Hutton had himself borrowed from the bank and which he agreed to pay by the terms of the contract of dissolution.

Ans. One note for..... $435 50
Interest..... 25 80
Another note..... 4,328 06
Interest..... 216 40

Q. 11. State what amount was owing to the bank by Harper & Co., which Hutton agreed with Ivinson to pay by the terms of the contract for dissolution.

Ans. Balance of one note and interest, 3,220.16.

Q. 12. In this settlement of the partnership business between Hutton & Ivinson, name the sums of money which had been paid by the partnership of Hutton & Ivinson to Ivinson as his share from sales of
66 beef, and for which Hutton was to have credit in the settlement.

Ans. Ivinson received from the sale of the Pacific market and slaughter house and beef which had been killed for the market by Hutton and Ivinson..... $3,332 50
Rec'd Nov. or Oct. 1872..... 791 50
Rec'd Jan'y 2, 1873..... 884 00
Rec'd Jan'y 3, 1873..... 500 00
Rec'd Jan'y 20, 1873..... 510 50
Rec'd Feb'y 15, 1873..... 427 00
Rec'd March 17, 1873..... 811 50

Total..... 7,257 00

Q. 13. Were the items named in your last answer all that Hutton was to receive credit for upon the settlement for any purpose or thing?

Ans. They were.

Q. 14. Was not M'r Hutton to receive credit in the settlement on account of a sale of cattle in Chicago, of which the proceeds had been received by Ivinson?

Ans. He was not.

67 Q. 14. In stating amounts in your answers, have you done so from memory or by reference to books of accounts?

Ans. They have been taken from books of accounts.

Q. 15. State what books of accounts.

Taken from the books of Hutton and Ivinson and from the books of the bank and from memorandums made from these books.

Q. 16. Where were the instructions given to Judge Kingman to draw up the papers?

Ans. I am not positive whether it was at his office or at the bank, but think it was at the bank.

Q. 17. Were you present when the papers were drawn up?

Ans. I was not.

Q. 18. How long after the instructions to draw the papers were
68 given was it before the papers were signed & delivered?

Ans. Some three or four days.

Q. 19. Do you know of M'r Ivinson having realized any sums of money from sales of the partnership property besides what he realized by the contract of dissolution with M'r Hutton?

Ans. I do not.

Q. 20. Do you know of M'r Ivinson realizing any money from a sale of a portion of the partnership property, consisting of cattle in Chicago?

Ans. I do not. I know of the firm of Hutton & Ivinson realizing money from such a sale.

Q. 21. Who eventually received that money?

Ans. Hutton and Ivinson received that money, and it was paid by them to their creditors in liquidating their debts.

69 Q. 22. To what creditors was it paid?

Ans. It was placed to the credit of their open bank account, with the bank of Edward Ivinson, and was checked out by them in payment of numerous claims for help, &c.; and a part of it went to pay a note of Edward Creighton. It is impossible for me to tell the particular persons to whom the money was paid.

Q. 23. State the amount realized from this sale of cattle in Chicago.

Ans. $6,565.36.

Q. 24. Did the firm realize any money from the sale of bulls to J. M. Carey?

Ans. The firm realized $300.00 for ten bulls sold to him at $30 per head.

Q. 25. State at what time it was agreed between Hutton and Ivinson that if any mistake was made by yourself in casting up the amount they would rectify it.

70 On the 8th or 9th of April, 1873.

Q. 26. Was that at the time the terms of dissolution were agreed upon and instructions given for drawing the papers?

Ans. I do not remember positively, but think it was.

Q. 27. Did you make any entries on the books of the firm of Hutton & Ivinson between the time when the terms of the dissolution were agreed upon and the time when the duplicate contracts for dissolution were signed & delivered?

Ans. I do not remember of having made any.

Q. 28. At what time on the 12th of April, 1873, did you discover the error mentioned by you in your direct examination?

Ans. About 5 o'clock in the evening, when I was making up the bank books and striking the balance.

71 Q. 29. At that time was the contract of dissolution signed and delivered between the parties?

Ans. It was.

Q. 30. Up to the time that the contract for dissolution was signed and delivered, had M'r Hutton examined the items of account of the partnership business of Ivinson & Hutton?

Ans. He had not.

Q. 31. In stating the items that the parties agreed to in making up the sum of $51,075.66, do you state them from your own memory, or from reference to books, or memoranda?

Ans. I make the statements from books and memoranda.

Q. 32. What books and memoranda?

From the books of Hutton and Ivinson, and memoranda I made from the books of the bank.

72 Q. 33. Did you mean to say in your direct examination that complainant and defendant agreed to those items severally, making up the $51,075.66?

Ans. I did not.

Q. 34. Was the amount of 7,257.00, which you say Ivinson received from the firm, ever received by the firm itself, and so entered on its books?

Ans. It was.

Q. 35. Did it stand to the credit of the firm on its books at the time of dissolution?

Ans. It did not.

Q. 36. Why not?

Ans. It had been charged up to M'r Ivinson and taken by him to his individual account, as it was only his share received from sales of beef, &c.

73 Q. 37. At the time of the dissolution, state what amount was due M'r Ivinson from the firm of Hutton & Ivinson on its books, on account of Ivinson's advances to the firm.

Ans. The amount was $37,822.70; this is short 27.04 of the actual amount due Ivinson, this last amount being ascertained on the open bank account. After the firm-books had been closed on the settlement Ivinson allowed Hutton a credit of $7,257.00, being the amount received by him from the firm per ledger, page 4. The 37,822.70 includes 90.37 interest on a note due to the bank by Hutton & Ivinson.

Q. 38. State fully by debits and credits the condition of the stock account of Ivinson opened by you at the time Ivinson drew upon the Omaha bank for $15,000.00, and which you say in your direct examination was reduced to $10,963.88 at the time of the dissolution of copartnership.

Ans. I cannot state anything but the balances without having the books of the bank before me.

74 Q. 39. How were you enabled to state the balances of that account?

Ans. From a memorandum I had in my possession.

Q. 39. How and by whom was that memorandum made out?

Ans. The memorandum was taken from the note which M'r Ivinson

gave to balance the account at the time of the settlement between him and the bank, and it was made out by myself.

Q. 40. Have you any recollection of the items of that account?

Ans. I have a recollection of only a part of the items.

Q. 41. Name those you recollect.

Ans. First a debit to that account of $15,000, being the amount paid by Ivinson to Creighton. That account had received credit dur-
75 ing the entire copartnership of 7,257.00. This is all I can remember the exact amount of.

Q. 42. Was the 7,257.00 one or several items?

Ans. It was several items.

Q. 43. Did you discover the error mentioned in your direct examination from an examination of the books of Hutton & Ivinson or the books of the bank of M'r Ivinson?

Ans. I discovered it from an examination of the books of the bank, and afterwards proved it by an examination of the books of Hutton & Ivinson.

Q. 44. Was the discrepency found between the accounts of the bank books, or between the cash account and cash on hand?

Ans. The discrepency was found in Ivinson' stock account,
76 which should have shown a credit to said account of 5,000.00, less the interest which I had charged up to him; and it only showed a credit of, I think, $876.00.

Q. 45. Do you at present sustain any business relations with the complainant; and, if so, what?

Ans. I am the cashier of the Wyoming National Bank, of which Ivinson is the president and one of the directors.

Q. 46. Were you the cashier of the bank of the complainant, and also his confidential clerk and advisor, during the existence of the partnership of Hutton and Ivinson, and at the time of its dissolution?

Ans. I was.

Q. 47. In whose possession are the books of the late firm of Hutton & Ivinson?

Ans. In the possession of Judge Kingman. They were left with
77 him pursuant to the direction of M'r Hutton, whose property they became.

Q. 47. At or about the time of the dissolution of the copartnership, was it agreed between the complainant and defendant that said books should be left in your possession, to be closed by you in accordance with the written contract of dissolution, and then turned over to defendant?

Ans. I do not remember that it was agreed between them, but M'r Hutton asked me who the books belonged to, and I told him they belonged to him. I also told him I would bring down the balance lines, and then turn them over to him.

Q. 48. Did you close the books in accordance with the written contract of dissolution?

Ans. I closed the books; but I do not remember that the written contract of dissolution had anything to do with closing them.

78 Q. 49. In your examination-in-chief, you spoke of a bonus of 5,000.00 to be paid by defendant to complainant, as one of the items making the sum of $47,039.54. In the basis of settlement was this 5,000.00 bonus the entire amount that M'r Ivinson was to realize as a profit on the partnership transaction?

Ans. It was.

Re-examination by complainant's counsel, J. W. Kingman:

Q. 1. State whether any attempts were made by the parties after the discovery of said error to settle the same; and, if so, what.

(Objected to by defendant for reasons before given.)

Ans. After the error was discover'd, Hutton appointed M'r Downey to go over the books with me, to see if I could convince him
79 whether the error had been made. M'r Downey and I went over the books, item by item; but M'r Downey did not agree with me. Afterwards, Hutton, Downey, Kingman, and myself, at Kingman's office, looked over the matter, for the purpose of discovery, if possible, if the error existed, but we never came to any satisfactory conclusion. The parties made several attempts to settle, but failed to do so.

Q. 2. If you can, explain more fully your answer to cross-interrogatory number 33.

In saying that they did not agree to those items severally, I meant that the amount of each item had not been figured up, and was not positively known. But the character of the items were determined and agreed upon.

A. G. SWAIN.

80 Endorsed on back as follows, to wit: "A. G. Swain. Filed Jan'y 21st, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy."

81 EDWARD IVINSON.

Q. 1. State whether or not you were a member of the late firm of Hutton & Ivinson.

Ans. I was.

Q. 2. When did that copartnership commence and when did it terminate?

Ans. It commenced in September, 1872, and was concluded in April, 1873.

Q. 3. How was it dissolved?

Ans. By mutual consent.

Q. 4. State the terms of the dissolution of the copartnership.

(Defendant objects to the question and answer, and avers that it is incompetent, immaterial, and irrelevant.)

Ans. M'r Hutton made this proposition: I will agree to pay you back all the money you have put into this business of partnership, and
82 I will pay all the expenses the firm has incurred, all the money I owe you personally; also I will pay you a note of Harper & Co.; that I will straighten up all the accounts of the firm and my individual accounts; that I will pay all the debts the firm owes, and pay you five thousand dollars for your investment in the partnership. For that I was to transfer all my interest in the partnership property and business. I told Hutton I thought the investment was worth more that $5,000.00. I told him I thought it was worth $10,000.00. After talking the matter over quite awhile I agreed to accept his proposition.

Q. 5. Who constituted the firm of Harper & Co., and to whom was the debt of Harper & Co., mentioned in your last answer, owing?

(Defendant objects as before.)

Charles H. Hutton and George Harper constituted the firm of
83 Harper & Co. The debt was owing to either to me or my bank. It was money I had loaned them.

Q. 6. State, if you remember, the time when the contract for dissolution was agreed upon.

(Defendant objects as before.)

Ans. Some day or two before the papers were made out.

Q. 7. In what way was it agreed to ascertain the amount Hutton was to pay?

(Defendant objects same as before.)

Ans. That was left to the bookkeeper. It was agreed to leave it to him by both parties.

Q. 8. What amount did the bookkeeper report the same to be?

(Defendant objects same as before.)

84 Ans. I think he reported the amount to be $47,039.54.

Q. 9. State whether or not anything was agreed between you and M'r Hutton as to correcting that amount, if it should prove to be erroneous.

(Defendant objects, same as before.)

Ans. The agreement was, that if any mistakes were made, that they would be rectified.

Q. 10. Have you, since the contract of dissolution was executed, ascertained whether or not there was any error in the amounts given by the bookkeeper?

(Defendant objects, same as before.)

Ans. The second day after the contract for dissolution was signed and delivered I ascertained that there was a mistake in the amount given by the bookkeeper of $4,036.12 against me. The amount entered
85 by the bookkeeper should have been $51,075.66.

Q. 11. State whether or not any attempts were made by you to correct the error and settle the matter with M'r Hutton.

(Defendant objects, same as before.)

Ans. I did make such attempts through the bookkeeper and M'r Downey. I did not bring myself in direct communication with M'r Hutton. The efforts were continued until the commencement of the suit.

Cross-examined by W. W. Corlett and S. W. Downey:

Q. 1. How long were you and M'r Hutton negociating for a dissolution of the copartnership before the contract was signed and delivered?

86 We talked the matter over some time before that; I cannot say how long. The conversation in reference to the dissolution commenced probably two or three months before.

Q. 2. When did M'r Hutton make the proposition mentioned by you in your direct examination?

Ans. He made the proposition probably two or three days before the papers were made out.

Q. 3. When were the papers signed and delivered?

Ans. I think, on the 11th or 12th day of April, 1873.

Q. 4. Have you stated all the terms of the contract?

Ans. All that I now remember.

Q. 5. Was there a written contract of dissolution executed by yourself and M'r Hutton?

87 There was.

Q. 6. Where is that written contract?

Ans. One I have; do not know where the other is.

Q. 7. At what time did yourself and M'r Hutton finally agree to sign and deliver the papers for dissolution?

Ans. We signed them and turned them over to each other on Saturday morning, April 12, 1873.

Q. 8. Previous to that did you authorize Mr A. G. Swain to make any proposition to Mr Hutton for dissolution?

Ans. I probably did; but I do not recollect any specification nor any specific proposition I authorized him to make.

Q. 9. At the time of the dissolution how much money had you put into the partnership business?

88 Ans. I cannot now say exactly what the amount was.

Q. 9. State, if you know, what all the expenses of the partnership business had been up to the time of dissolution.

Ans. I cannot say. My memory will not carry those things.

Q. 10. State, if you know, how much money Hutton owed you personally at the time of the dissolution.

Ans. I cannot state that either.

Q. 11. State, if you know, the amount of the note due to you from Harper & Co. at the time of the dissolution.

Ans. I cannot state that either without going and looking through the books.

Q. 12. How do you know that the bookkeeper reported the amount that Hutton was to pay you was 47,039.54?

Ans. I only know it from what the bookkeeper said. Do not know of my own personal knowledge.

89 Q. 13. When was it agreed between yourself and Mr Hutton that any mistakes made should be rectified?

Ans. About the time we agreed to dissolve partnership. Some two or three days before the papers were signed.

Q. 14. Where were the papers for dissolution drawn?

Ans. I cannot say where they were drawn.

Q. 15. Were you present when they were drawn?

Ans. I don't think I was.

Q. 16. What day of the week was it that you discovered the error in the amount given by the bookkeeper, and how did you discover it?

I discovered it Monday after the papers were delivered. I had the bookkeeper go through the books with me when I discovered the mistake.

90 Q. 17. State particularly the nature of the mistake.

Ans. I cannot now state particularly the nature of the mistake.

Q. 18. State how you know that the error was 4,036.12 against you.

Ans. After going over the books with the bookkeeper I was convinced of the mistake. I went to the bank books to see my stock account. I found that instead of having a credit or a profit of $5,000.00 less the interest I owed to the bank, I only had, I think, 876.00. I called the cashier and asked him how is this. Then he went to work and told me the whole story. We went to work and went through the books together, and he shewed me where the mistake was. I asked him why he had not told me of this matter before, and he said that Hutton had agreed to fix the matter up, to meet at Kingman's office and on Sunday, and he did not want me to know of it until it was fixed up.

91 Q. 19. How do you know that the sum returned by the clerk as the amount Mr Hutton was to pay you should have been $51,075.66?

Ans. I found out by going over the books that this mistake was made.

Q. 20. Was the mistake in one account or several accounts?

Ans. I think the mistake was in one account; my stock account.

Q. 21. Was that account on the books of Hutton and Ivinson or on the books of Edward Ivinson, banker?

Ans. I cannot say now in regard to that.

Q. 22. Shortly after discovering the error referred to, did you propose to M'r Downey, as attorney for M'r Hutton, that an agreement should be drawn up and signed between yourself and M'r Hutton to correct any mistakes that might have been made in the settlement of the partnership business?

92 Ans. No. I did propose to do this: we would draw up papers to leave this matter in the hands of some disinterested parties. At the time M'r Downey claimed that the mistakes was on the other side I proposed to leave the whole thing to three disinterested parties. M'r Downey agreed to it and agreed to draw the papers. The matter stood this way for several days, and M'r Downey never drew the papers.

Q. 23. Did you tell M'r Swain when you were informed of the error you have spoken of that you would hold him responsible for the amount of it?

No.

Q. 24. What did you say to him?

I do not recollect of saying anything to him about it.

Q. 25. Look at this instrument, marked "4," and say whether or not the signature Edward Ivinson attached to it is your signature, & whether it was written by you, and whether the said instrument was delivered to Charles H. Hutton.

93 Ans. That is my signature; was written by me. I do not now recollect, but I suppose the instrument was deliverd to M'r Hutton.

(Insert instrument.)

94 This agreement, made this 11th day of April, A. D. 1873, between Charles H. Hutton and Edward Ivinson, witnesseth:

That whereas the said parties have this day settled all matters pertaining to their late partnership, and dissolved the same; and whereas the said Hutton has made and delivered to the said Ivinson his note of hand for *for* $13,582.54, of this date, payable September 1st, 1873, at two per cent. per month till paid, and if not paid at maturity, then at 3% per month thereafter, and secured said note by mortgage on real and personal property:

Now, it is agreed that the said Ivinson will receive at any time after date any sum or sums of money which said Hutton may wish to pay and endorse the same on said note in part payment thereof, and that interest shall cease on such amounts so endorsed; and whereas the said Hutton has agreed to pay and discharge a certain note of hand, signed by said Hutton and Ivinson, payable to Edward Creighton or order in twelve months from date, and dated August 29th, 1872, for 12,500, and secured said promise and agreement by a mortgage on real estate

95 of this date:

Now, it is agreed by and between the parties hereto that if the said note to Creighton is not paid at maturity, and the said Ivinson shall be compelled to pay the whole, or any part thereof, then the said Hutton shall pay said Ivinson interest on all such sums so by him paid on said note at the rate of three per cent. per month, from time of payment: and the said Ivinson hereby agrees that if the said Hutton will pay and discharge all the notes and obligations by him signed this day in the settlement of their said partnership business within sixty days from this date, then, in consideration thereof, he, the said Ivinson, will pay him, the said Hutton, the sum of five hundred dollars.

And it is agreed that the money received from the sale of any sheep that may be sold at Salt Lake shall be paid and endorsed on said note.

Witness our hands and seals.

CHARLES H. HUTTON. [L. S.]
EDWARD IVINSON. [L. S.]

96 Re-examined by Judge Kingman:

Q. 1. You say in your answer to direct interrogatory No. four, M'r Hutton proposed to pay all the expen'es the firm has incur'ed; what expenses did you understand that to include?

(Defendant objects as before.)

Ans. I understood that to include all money I had put into the firm, and all debts the firm then owed on account of expenses.

Q. 2. Was there at any time any proposition or agreement between you and M'r Hutton to jump at the amount to be paid by him, or to fix on any definite sum for a dissolution and settlement?

(Defendant objects to question and answer because leading, incompetent, immaterial, and irrelevant, and not properly a re-examination.)

Ans. No.

97 Q. 4. Has there been any error discovered in the private debts of M'r Hutton included in your settlement, or in the indebtiness of Harper & Co., as figured up and given in by M'r Swain?

(Defendant objects as above.)

Ans. Not to my recollection.

EDWARD IVINSON.

(Indorsed:) Filed January 21st, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy.

98 J. W. KINGMAN.

Q. 1. State whether or not you were employed by the parties to this suit to draw up the necessary papers to carry out their agreement for a dissolution of their copartnership and for a settlement of their affairs.

Ans. I was, some few days before the 11th day of April, 1873. The parties, Ivinson and Hutton, saw me and said they had agreed to dissolve their partnership, and wished me to draw up the necessary papers. They told me in general terms what the agreement was. I asked them to come to my office with Mr. Swain and give me the exact particulars of all their agreements.

(Defendant objects to all of the foregoing answer except the first sentence, for the reason that the same is not responsive to the questions.)

Q. 2. State what was done by the parties and by yourself in reference to drawing and executing these papers.

99 (Defendant objects to question and answers because incompetent, immaterial, and irrelevant.)

Ans. M'r Hutton, M'r Ivinson, M'r Swain, and Col. Downey came to my office together and talked over the terms of the agreement and the stipulations to be included in their settlement and dissolution. I took down a careful memoranda of all the items mentioned. The parties agreed to dissolve their partnership on these terms. M'r Ivinson was to deed to M'r Hutton all his interest in the real estate of the partnership and release all his interest in the personal property. M'r Hutton was to repay to M'r Ivinson whatever sums of money he had paid into the partnership, to pay all the partnership debts, to pay or secure all the debts he owed to the bank as partner or otherwise, and to give a bonus

of 5,000.00, and secure the payment of any balance that might remain after certain arrangements that they had entered into for a payment of a part of the sum by a mortgage on the real estate of the late firm. M'r Hutton was to be credited with whatever sums of money M'r Ivinson had received out of the partnership. It was agreed by the parties to take the statement of M'r Swain as to the total amount which M'r Hutton was to pay under this agreement, both parties saying
100 they did not know how much the amount was. M'r Swain handed me a slip of paper on which was written the figures 47,039.54, and said that was the amount that would be due according to their agreement. Something was said as to whether that amount was correct or not, and both parties said if it was not correct they would make it correct. M'r Swain said he believed it to be correct. I drew up the papers during the next two days, including an *argument* for dissolution in duplicate, a deed for real estate from M'r Ivinson to M'r Hutton, a mortgage from M'r Hutton to M'r Ivinson, a bill of sale or assignment from M'r Ivinson to M'r Hutton of personal property, and a number of notes of hand to be signed by M'r Hutton. The papers were finally signed and delivered on Saturday morning, April 12th, 1873.

Q. 3. State whether or not any errror in the amount given by M'r Swain was afterwards discovered, and if so, what was done in reference thereto?

(Def't objects as before.)

101 Ans. On Saturday evening M'r Swain came to my office and said that on balancing his books he discovered that he had made an error of about 4,000.00 as against M'r Ivinson, and wanted to know what he should do about it. The next morning he (Swain) and M'r Hutton came into my office. The matter of the error was fully talked over and explained to M'r Hutton. Mr. Hutton spoke very fairly in reference to it. He said he would rather it had been against him—that is, for him (Hutton) to make good—than against M'r Ivinson, because he thought in that event it would be easier to settle it; that he would examine the books with Col. Downey, and if any mistake had been made he would correct it; that he did not want a cent of any man's money that did not belong to him, and that he would attend to the matter the next day.

Q. 4. State whether or not you ever examined the books and accounts from which M'r Swain made up the amount which was put into the contract between the parties.

(Def't objects as before.)

102 Ans. I had at several times with M'r Swain and with Col. Downey.

Q. 5. State whether or not you discovered any error in the amount given by M'r Swain; and, if so, what?

(Def't objects as before.)

I did; there was an error of 4,036.12 against M'r Ivinson. The amount M'r Swain should have given was 51,075.66. It occurred in this way: M'r Swain had charged to M'r Ivinson in his stock account the amount of 4,032.16 as money received from the sale of beef and other partnership property, and on crediting M'r Hutton for the amount of money which M'r Ivinson had received out of the partnership he credited him with the sum of 7,257.00, which was the entire amount that Ivinson had received, including the 4,036.12 which had already been charged to Ivinson.

Q. 6. State what further attempts were made by the parties to settle this matter?

(Def't objects as before.)

103 Ans. I had several conferences with M'r Hutton and M'r Ivinson and Col. Downey during the succeeding three months, and very many propositions were made and discussed looking to a settlement. At one time it was proposed to refer the matter, at another time it was proposed that Col. Downey and myself should examine the books and accounts with M'r Swain, and several attempts were made to come to a final understanding; no result was arrived at, but both parties expressed a desire to have the matter amicably adjusted, and always expressed a willingness to do what was right about it.

Cross-examined by W. W. Corlett and L. W. Downey:

Q. 1. At what time did M'r Hutton, M'r Ivinson, & Col. Downey come to your office and talk over their agreement for settlement and dissolution?

Ans. It was on the 9th or 10th of April, 1873.

Q. 2. Were the papers drawn by you from the memorandums then taken by you?

Ans. They were.

104 Q. 3. Where is that memorandum?

Ans. I presume I destroyed it. I haven't it in my possession.

Q. 4. How many different instruments were drawn by you in preparing papers for settlement?

Ans. There were quite a number. I do not know that I can answer more fully than I have.

Q. 5. Were you present when these papers were signed and delivered?

Ans. I think I was.

Q. 6. When and where was it done?

Ans. It was done at the bank, Saturday forenoon, April 12, 1873.

Q. 7. What papers were delivered to M'r Ivinson pursuant to the agreement?

Ans. A duplicate of the contract of dissolution, a mortgage on the ranches to secure a balance not otherwise secured, and several
105 notes covering various sums to be paid by M'r Hutton, 2 orders on the railroad, a chattel mortgage on certain lumber at Lookout Station, a note of Hutton and Fillmore to Ivinson, some papers in reference to the Buzzard matter.

Q. 8. Where is Ivinson's contract of dissolution?

Ans. There were duplicates of the contract; each party got one and Ivinson has his.

Q. 9. Who recompensed you for your services in drawing the papers?

I made the charges against M'r Ivinson, but have not yet got the money.

Q. 10. When was M'r Hutton to pay M'r Ivinson whatever sums of money he had paid into the partnership?

Ans. Some portions were paid down at the time, some were to be paid in thirty days, and the balance by the 1st of September, 1873.

Q. 11. When were the partnership debts by that agreement to be paid?

106 Ans. I think there was no time limited. Hutton was to indemnify Ivinson against them.

Q. 12. What were the stipulations in relation to the debts owed the bank as partners or otherwise?

Ans. They were all to be included in the amount to be figured up by Swain, and were provided for in the general settlement.

Q. 13. Was the entire amount of the amount to be paid by M'r Hutton at the time of the settlement to be paid then or secured to be paid satisfactory to M'r Ivinson?

Ans. It was.

Q. 14. When did M'r Swain hand you the slip of paper upon which was written the figures 47,039.54?

Ans. I think it was at my office, when the parties were present, when I took the memorandum.

Q. 15. When did both parties say that if the amount was not correct they would make it so?

At the time I took the memorandum.

107 Q. 16. What did M'r Hutton say at the time yourself and M'r Swain explained the alleged error to him?

Ans. There was a good deal said, but I don't know that I can state more fully than I have already done what he did say. What I intended to say, if I did not say it, is M'r Hutton said he would rather have the mistake for him to rectify than M'r Ivinson, because he thought it could be easier settled under such circumstances.

Q. 17. When the papers were drawn was there any hesitation or further negotiations between the parties before signing and delivering them?

Q. 18. There was further talk in reference to some small matters about which the parties had some misunderstanding.

Q. 19. When was the dissolution considered as completed and closed by the parties?

Ans. On Saturday morning, April 12th, 1873, when the papers were finally executed.

108 Q. 20. What books did you examine in connection with M'r Swain with the view of discovering the alleged error?

Ans. The books of the partnership and memoranda of the books of the bank.

Q. 21. Did you of your own knowledge know anything respecting the correctness of the entries in the books and the memoranda?

Ans. I did not of my own knowledge, but as I understood it, both parties agreed to the character of the different items.

Q. 22. Was the alleged error apparent from the books of the partnership alone?

Ans. I think it was.

Q. 23. At the time of the settlement did M'r Ivinson acknowledge the receipt of the 47,039.54, as agreed upon?

Ans. I think not, except as inserted in the articles of dissolution.

J. W. KINGMAN.

Complainant closes his testimony.

109 Endorsed on back as follows: "Filed Jan'y 21, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy.

110 *Defendant's testimony.*

CHARLES G. HUTTON.

Examined by M'r Corlett:

Q. 1. Are you the defendant in this action?

Ans. Yes, sir.

Q. 2. Did you know the late firm of Hutton and Ivinson?

Ans. Yes, sir.

Q. 3. When was that firm dissolved?

Ans. Last April.

Q. 4. How was it dissolved?

Ans. By the mutual consent of both parties.

Q. 5. Was any contract made at the time of dissolution; and, if so, how, by writing or parol?

111 Ans. A contract was made. It is in writing.

Q. 6. State fully the negotiations between the complainant and yourself previous to the execution of the contract of dissolution.

Ans. We had several talks before we came at anything. About the last proposition was made during court week, in March or April, 1873. M'r Ivinson made me a proposition through M'r Swain. M'r Swain brought me a piece of paper with a statement upon it of what Ivinson would take. I told him if he would give me time to go to Iowa and back I would then tell him what I would do. When I came back I agreed with Swain and Ivinson what I would do. The agreement was that I would clean up all my individual indebtedness and Harper & Co. That Swain and Ivinson should figure up all I owed, including Harper & Co., and all that the firm of Hutton & Ivinson owed; everything was to be

112 cleaned up; then Ivinson was to make me a proposition. M'r Swain, for M'r Ivinson, figured up the amounts and gave me a paper with the gross amount upon it, and also several items upon it, the same as the account attached to the copy of the agreement filed with my answer in this case, except there was a little difference in the mode of payment: the gross amount stated upon the paper was $47,039.54. I accepted the proposition. The next thing that occurred was M'r Ivinson spoke to Judge Kingman to draw up the papers, and we were to meet at Judge Kingman's office that evening for that purpose. Col. Downey and myself came to Kingman's office that evening, and Kingman, Ivinson, and Swain were there. I gave Col. Downey the piece of paper that Swain had given me, which had the basis of the trade upon it. Judge Kingman asked us if we had agreed to that amount. Col. Downey asked M'r. Ivinson if that amount was correct, and Swain said he would vouch for it. That was about all the conversation we had: the different amounts was agreed upon, and Judge Kingman took

113 a minute of them. I think Judge Kingman went to work that evening drawing up the writings: that was all to my recollection that was done that evening, and Judge Kingman was to try and get the writings done by the next day noon.

Q. 7. You may state what became of the proposition upon the paper which Swain gave to you and you to M'r Downey.

Ans. A day or two after the papers were signed I had the proposition in Col. Downey's office, and I think I destroyed it.

Q. 8. State what knowledge you had of the condition of your accounts with Mr. Ivinson, and of the accounts with Hutton and Ivinson.

Ans. All the knowledge I had was from Swain's figures. I relied upon his figures.

114 Q. 9. State what, if anything, you had to do with the manner in which the proposition to you was made up, and as to the total amount which M'r Ivinson would receive for his interest in the firm.

Ans. We had several talks about the trade, and the way we came at it was, they made me the proposition on the paper, as I have before stated, and I accepted the proposition.

Q. 10. Where was the trade or bargain finally completed?

Ans. It was Saturday forenoon, April 12th, 1873.

Q. 11. Had you and M'r Ivinson made any efforts to complete the bargain and execute the papers previous to April 12, 1873? And, if so, state what efforts were made.

Ans. The evening of the 11th of April, 187?, I and M'r Downey came to Judge Kingman's office, and we waited until M'r Ivinson came. Judge Kingman read the papors he had drawn up, and I signed
115 what I was to sign, and M'r Ivinson, I believed, preferred waiting until morning. He said his head was a little fuddled, and he wanted to be clear about it. Col. Downey took the papers I had signed, and the understanding was he was to keep them until morning.

Q. 12. State all that occurred at the final execution and delivery of the papers, and where it was.

Ans. It was at Ivinson's Bank, the next morning. The papers were signed and delivered there. There was nothing said more than Ivinson signed the papers and we exchanged them there. I signed the note there, and there was some little changes made on them.

Q. 13. When were the final arrangements made as to your paying or securing to be paid the 47,039.54, and the times and amounts to be paid or secured to be paid.

On the morning of the 12th of April, 1873.

116 Q. 14. State what arrangements were made for your paying or securing to be paid the several amounts making up the total sum on the morning of the 12th of April, 1873.

Ans. I was to pay $7,257.60 cash; 100.00 cash; 5,000.00, Metcalf's agreement to furnish cash note, 13,582.54, had on or before Sept. 1st, 1873; 5,000.00 order on the U. P. R. R. Co., 30 days off; 2,000.00 cash, Sergeant Homer, and 6,200 on Buzzard, and 2,900.00 note signed by Hutton and Fillmore, payable in 30 (thirty) days.

Q. 15. Previous to the 12th of April, 1873, what had been the understanding between yourself and M'r Ivinson as to the payment of the amount indicated by the note of 2,900.00?

Ans. The understanding at one time was that I was to pay 3,000.00 in cash. I paid 100.00 of it, and the note for 2,900.00 was taken in lieu of the remainder of the 3,000,00 I was to pay in cash. I think
117 M'r Ivinson agreed to that on the 11th of April, 1873.

Q. 16. Was there any completed trade between yourself and M'r Ivinson before you had paid or secured to be paid to his satisfaction the whole amount which you were to pay?

Ans. There was not.

Q. 17. Had you the ability at that time to pay or secure to be paid to M'r Ivinson 4,000.00 more?

Ans. I do not think I had.

Q. 18. State now what, if anything, was said by you to M'r Ivinson, or any one else, as to correcting any mistakes in these transactions, while negotiations were pending between yourself and M'r Ivinson?

Ans. I said nothing on that subject.

Q. 19. Have you in your possession any written statement of the bank account between Hutton and Ivinson and Edward Ivinson's bank?

118 Ans. I have.

Q. 20. Does that cover and include the entire account of that firm, Hutton and Ivinson, during its entire existence.

Ans. I believe it does.

Q. 21. Look at the paper marked "B" and say if it is or is not the bank account referred to by you in your last answer.

Ans. It is.

Defendant puts in evidence the bank account.

Dr. *Hutton and Irinson in acc. with Edward Irinson's bank.* Cr.

1872.				1872.			
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" "	" "	20 "	60	" 3.	" Pacific market		70 "
" 25.	" "	12 "		" 5.	" " "		80 "
" "	" "	18 65	30 65	" 10.	" cattle to Chicago		4,000 "
" 27.	" "		60	" 11.	" " "		1,893 36
" 28.	" "		9 31	" 22.	" board for Filmore		45 "
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Oct. 2.	ch'k	67 "					
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" 3.	" "		6 65	Jan. 17.	" Davidson & Hay		425
" 9.	" "		30 30	28.	" lumber		513 34
" 12.	" "		625 "	30.	" Davidson on Hay		35 "
" 16.	" "	36 "		Feb. 25.	running note & int		1,030 25
" "	" "	75 "	111 "	M'ch 3.	Lane on Hay		700 "
" 17.	" "		86 70				
" 21.	" "	60			To bal		10,138 16
" "	" "	85 20	145 20				
" 25.	" note	1,105 03					
" "	" c'k	361 42					
" "	" "	109 57	1,575 96				
" 28.	" "		66 66				
" 31.	" int		1 87				
Nov. 7.	" note		330 "				
" 9.	" c'k		42 65				
" 11.	" "	69 85					
" "	" "	86 66					
" "	" "	86 66	243 17				
" 15.	" note & int		510 "				
" 16.	" c'k		41 "				
" 18.		65 90					
" "	" "	40 "					
" "	" "	6 "	111 90				
" 19.	" "		60 77				
26.	" "		43 25				
" 28.	" "		110 "				
Dec. 7.	" "		86 64				
" 10.	" note & int		515 "				
" 17.	" c'k		83 60				
" 18.			112 "				

Dr. *Hutton and Icinson in acc. with Edward Icinson's bank*—Continued. Cr.

Dec. 19.			30 "			
" 20.		57 25				
" "		47 80	105 05			
	For'd	$		For'd	$	
120						
1872.	Bro't for'd			Bro't for'd		
Jan. 7.	To J. W. Colins		5 50			
" 28.	" c'k		128 35			
" 29.			34 55			
Feb. 3.	" "		15 18			
" 5.			6 81			
" 7.	" Cla'ke Heimson		4 "			
" 8.	" c'k		10			
" 10.	" Clark Heimson		2 29			
" 12.	" "		2			
" 15.	" "		8 59			
" 17.	" "		50			
" 18.	" c'k		40 "			
" 20.	" Cla'ke Heimson		1 50			
Mar. 5.	c'k		13,295 70			
" 8.	Cla'ke Heimson		13 55			
" 12.	c'k		240 "			
" 21.	Clarke Heimson	12				
" "	"	4 80	16 80			
" 31.	int		83 17			
Apr. 5.	c'k		5 "			
		$	20,377 11			$20,377 11

121 Q. 22. State if you know out of what account the expenses of the firm of Hutton and Ivinson were paid.

Ans. Paid out of the bank account of Hutton & Ivinson.

Q. 23. Are they represented on the debit side of the bank statement you have spoken of?

Ans. They are.

Q. 24. State fully the sums of money M'r Ivinson paid into the firm or for the firm during its existence.

Ans. Fifteen thousand dollars at the start paid to Creighton, balance on the bank account of 10,138.16. This is all I know of, except what appears by the bank account.

Q. 25. State what you know, if anything, in relation to M'r Ivinson paying into the firm at any time during its existence, or especially on January 28, 1873, the sum of 8,773.34.

122 I know nothing about it except that M'r Swain showed me on the books. I never understood clearly the way the books were kept. M'r Swain explained it to me a time or two, and I suppose they were all right.

Q. 26. Did you receive credit upon the books of Hutton & Ivinson for the same amount of $8,773.34?

Ans. I believe I did.

Q. 27. Now state whether or not, in accordance with the book entry, you put into the firm for the benefit of the firm the amount of 8,773 34 you are credited with; and, if so, how.

Ans. I did. I gave an order on the R. R. Co. to Creighton for a portion of it and an order on the Wyoming Coal Company to Creighton for the remainder. These orders were paid.

Q. 28. State whether or not the firm of Hutton and Ivinson ever

123 received credit for the sum of 8,773.34 upon their bank account with Edward Ivinson as having been reported to their credit by Edward Ivinson.

Ans. It did not.

Q. 29. State whether or not on the 28th of January, 1873, or at any other time, M'r Ivinson paid the amount of 8,773.34 into the firm in any way, or paid that amount of the firm's debt.

Ans. He did not to my knowledge. It was fixed up some way on the books. I never could see through it. We are both credited in the same amount on the books.

Q. 30. Do you know why M'r Ivinson was credited on the books of the firm with cash 8,773.34?

Ans. I do not know.

Q. 31. State how you know M'r Ivinson did not pay that amount out upon the indebtiness of the firm to M'r Creighton.

124 Ans. I know all that was paid to M'r Creighton, and I know that the balance still remaining due Creighton is $12,500.00 and interest. The total amount that was due Creighton from the firm was 50,000.00. Ivinson paid Creighton 15,000.00. I paid 8,000.00; bank account, 1,105.03; bank account, 13,295.70.

Q. 32. State how you know that M'r Ivinson did not pay the sum of 8,773.34 as the expenses of the firm of Hutton and Ivinson.

Ans. I know by reference to the bank statement.

Q. 33. Were there any other debts of the firm on Jan. 28, 1873, than the indebtiness to Creighton and the expenses as shown by the bank statement?

Ans. There is none other than the Creighton indebtiness except what the bank statement showed.

125 Cross-examined by Judge Kingman:

Q. 1. Was it agreed between you and M'r Ivinson at the time of the dissolution that the $15,000.00 paid by him to Creighton should be repaid to him by you?

Ans. It was so agreed.

Q. 2. Was it also agreed that all the sums paid by Ivinson into the partnership, or on account of it, should be repaid to him by you?

Ans. That was the understanding.

Q. 3. What additional sums were you to pay him for his interest as a bonus in the partnership?

Ans. Five thousand dollars.

Q. 4. Were not Creighton and Hutton owing the bank of Edward Ivinson, at the time Ivinson entered into partnership with you,
126 various sums, amounting to, in all, $12,017.37?

Ans. We owed the bank something, but I don't think it was that amount.

Q. 5. Did you and Ivinson settle with the bank and give your partnership note to the bank for $12,017.37; and, if so, for what was the note given?

Ans. We settled with the bank and gave our partnership note. I do not remember the amount of it. The note we gave was for some debts that Creighton and I owed the bank, and for some debts that I owed the bank.

Q. 6. How was the note you and Ivinson gave to the bank taken up?

Ans. I do not know how it came to be taken up.

CHARLES H. HUTTON.

127 (Indorsed:) Filed January 21st, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, deputy.

128 L. W. DOWNEY.

Q. 1. Are you acquainted with the parties to this action?

I am.

Q. 2. Were you a witness to the contract between these parties, by which the partnership subsisting between them was dissolved on the 12th day of April, 1873?

Ans. I was.

Q. 3. State what occurred between the parties to this action at the time of the final execution and delivery of that contract.

Ans. The writings were delivered between the parties on the 12th of April, 1873, at the bank of Edward Ivinson. The agreement of dissolution was delivered in duplicate, as also another agreement, by reference to a note of 13,582.54 and some other matters, said agreement being the one marked A, and attached to the testimony of
129 Edward Ivinson. This agreement just mentioned was delivered in duplicate, one copy to Ivinson and one to Hutton. M'r Ivinson delivered a deed to M'r Hutton, signed by himself and wife, for the real estate and ranches belonging to the partnership. M'r Ivinson delivered to M'r Hutton a bill of sale embracing what was understood to be all the personal property belonging to the partnership. M'r Hutton delivered to M'r Ivinson, in addition to the writing already mentioned, the following writing: One note for 13,582.54, also $5,000.00 note secured by order on the R. R. Co. Another note, 30 days, *of* for 5,000.00, secured by order on the R. R. Co. Cash, 2,000.00, on Sargeant & Homer. Order on Bussard for 6,200.00. Note signed by Hutton and L. Filmore for 2,900.00. M'r Hutton delivered to M'r Ivinson a mortgage on certain

real estate which had been conveyed by Ivinson & wife to Hutton, also a chattel mortgage on certain lumber at Lookout Station. The delivery of all these instruments was at the same time and place, and all
130 one and the same transaction. Immediately after the papers were all delivered M'r Ivinson proposed to me that if I would raise him the money on the entire amount of 47,039.54, deducting the cash he would have received, that he would take 5,000.00 less than the amount named in the writing, I to put up a forfeit of one thousand dollars, and he to give me thirty days within which to raise the money.

Q. 4. State all you know of the negotiations for making the contract of dissolution which occurred between the plaintiff and defendant previous to the time the contract of dissolution was executed and delivered.

Ans. M'r Hutton brought me a slip of paper in the handwriting of M'r Swain which had upon it the amount of $47,039.54, and it also had upon it different amounts going to make up the before-mentioned sum, and which specified in short the manner in which the sum of 47,039.54 was to be paid. That piece of paper I took from M'r Hutton and
131 in company with him repaired to Judge Kingman's office, who I understood was then drawing the writings between Hutton and Ivinson. At Judge Kingman's office I met Kingman, Ivinson, and Swain. Hutton went with me to Kingman's office. I heard no question raised as to the amount of $47,039.54 being the correct amount except by myself. I think I asked M'r Ivinson or M'r Swain if the amount of $47,039.54 was correct, and M'r Swain answered in substance that it was correct. The questions raised by M'r Ivinson were in reference to the different payments making up that sum, he wanting more money paid down than M'r Hutton was able to pay. We were all one day and part of another in preparing the writing, and owing to the rate of interest stated in some of the notes being stated in such a way as to leave a doubt in my mind as to the amount, these notes were destroyed and other notes written. After the papers were all ready to be signed there still seemed to be some negotiations going on between Ivinson and Hutton as to certain cash payments. M'r Ivinson and Hutton were to sign the
132 writing on the night of the 11th of April, 1873. M'r Hutton signed the notes and papers he was to sign and M'r Ivinson afterwards came into Judge Kingman's office and he was told what M'r Hutton had done, and that it was now necessary for him to sign the writings on his part. M'r Ivinson took up a pen as if to sign the papers, but finally stood up and said he was not satisfied and he would not sign, and left the office without signing the papers. M'r Hutton and myself then left, I taking with me the papers M'r Hutton had signed. Next morning negotiations were renewed through M'r Swain, and M'r Ivinson in the bank executed and delivered the papers I have referred to.

Q. 5. Did M'r Hutton and M'r Ivinson or either of them say that there was any contract subsisting between them until the papers you have described were signed and delivered?

Ans. They did not. M'r Metcalf was waiting for the papers to
133 be executed in order to enable him to purchase an interest in the partnership personal property. He did wait until the papers were executed and then purchased an interest in such property.

Q. 6. State what you know, if anything, in relation to an alleged error occurring in making out the papers.

Ans. I know of no error in the papers; in reference to the mistake claimed to have been made against M'r Ivinson I heard nothing of it until perhaps two days after the execution of the writing, then I was

told by Hutton that Swain alleged he had made some error of about $4,000.00 against M'r Ivinson. At the solicitation of Hutton and Swain and Ivinson I examined the partnership-books but failed to discover any error as against M'r Ivinson, figuring on the basis of the manner in which M'r Swain told me he arrived at the amount Hutton was to pay Ivinson. I spent perhaps two or three hours in examining the
134 books, M'r Swain being present and explaining the different charges and credits, and endeavoring to convince me of the error which he claimed had been made. At this time M'r Swain told me that he did not discover the error in reference to the partnership-books, but in making up his cash in the bank he discovered it. Various proportions were made for the purpose of determining whether there was a mistake. In going over the books and figuring on the basis M'r Swain gave me, I claimed that the books showed an error against M'r Hutton of over $3,000.00. Either M'r Ivinson, Swain, or Judge Kingman proposed that Hutton and Ivinson should sign an agreement stipulating that the accounts should all be gone over and if an error was discovered against either party the other would agree to pay the amount of the error. No such agreement was ever made. It was then proposed that Judge Kingman and myself should examine the matter, and if we agreed that
135 that they should abide our agreement. We made some efforts, but did not agree. I never heard of any agreements before the execution of the contract and pending the negotiations for the same or any promise by either party that in case there should be any error or mistake, that such error or mistake would be corrected. Judge Kingman was careful in drawing the papers in order that there should be no question about it and so expressed himself, and if there had been any such agreement he would have put it into the papers.

Q. 8. State how the receipt at the end of the dissolution contract came to be signed as it is, and when, and where, it was done.

Ans. It was done at the bank of M'r Ivinson on the morning of April 12, 1873, by M'r Swain, M'r Ivinson standing by, I on behalf of Hutton requesting the same to be done. The receipts was appended, to wit, duplicates of the dissolution contract. Swain at the time was acting for M'r Ivinson.

S. W. DOWNEY.

136 The defendant here introduced the dissolution contract, see copy filed with the answer.

This is all the testimony offered by the defendants.

Endorsed on back as follows, to wit: "Filed Jan'y 21, 1874. J. W. Bruner, register in chancery, by J. W. Meldrun, dep'ty."

137 The plaintiff re-examine' M'r Swain.

A. G. SWAIN.

Q. 1. Will you explain in what manner M'r Ivinson paid into the firm of Hutton and Ivinson the sum of 8,773.34?

(The defendant objects to the question, because incompetent, immaterial and irrevelant and as well to the answer.)

Ans. At the time Hutton and Ivinson entered into co-partnership, it was agreed that when either one of them advanced any sum of money for the purpose of paying a co-partnership debt or otherwise that the other partner should advance a like sum; when M'r Hutton had advanced 8,773.34, the bank of Edward Ivinson was holding a note of Hutton and Ivinson for the amount of 12,017.37, which with interest amounted to

12,594.17, M'r Ivinson advanced the like sum of 8,773.34 as a payment on the note of Hutton and Ivinson due the bank, and the note of 1207.37 and interest was taken up, and a note given for the difference be-
138 tween the 12,594.17 and 8,773.34 and the note so given was 3,820.93 and signed by Hutton and Ivinson. Hutton for the firm signed both the 12,017.37 and the 3,820.93 notes and an explanation of the transaction was made to him at the time.

Q. 2. Explain the matter in reference to the paper which M'r Hutton says you gave him, containing the amount that would be due from him to Ivinson on their dissolution.

(Objected to by def'ts as before.)

Ans. I do not think that the papers furnished by me to Hutton ever contained the correct amount of 47,039.54 for the settlement which was consum'ated, and I further state that the only paper which ever contained a supposed correct amount was furnished by me to Judge Kingman at the time he was making up the papers for a dissolution. The papers I furnished Hutton were only intended to approximate the amount and I remember distinctly of figuring up the interest on notes on the day Kingman was making out the papers and bringing him the amounts to insert in the papers.

139 Q. 3. State whether or not the amounts you gave Judge Kingman differed from the amounts you had previously given Hutton.

(Objected by def't as before.)

Ans. They did. I remember of giving Hutton two different amounts. I think one amount was in the neighborhood of between 45 & 46,000.00, and the other was something over 50,000.00. The amounts so given to Hutton were not given from any careful or accurate calculation, and were given from a general knowledge of amounts due and without calculating interest.

Q. 4. In whose care is the contract for dissolution and the mortgage of real estate given by Hutton to Ivinson?

(Def'ts object same as before.)

Ans. They are in my care.

A. G. SWAIN.

The plaintiff puts in evidence the dissolution contract and mortgage.

This is all the evidence given in the case.

140 (Endorsed on back:) Filed Jan'y 21, 1874. J. W. Bruner, register in chancery, by J. W. Meldrum, dep'y.

141 *Exceptions to report of Jason B. Brown, special master in the above entitled cause.*

TERRITORY OF WYOMING,
County of Albany, ss:

In district court, 2nd judicial district.

EDWARD IVINSON, COMPLAINANT,
vs.
CHARLES H. HUTTON, DEFENDANT.

And now comes the said defendant Charles H. Hutton, by his attorneys S. W. Downey and W. W. Corlett, his attorneys and solicitors,

and file his exceptions to the report of the special master in this cause, which are as follows, to wit:

First. Defendant excepts to the 1st finding of said master in said cause, for the reason that the matters embraced in said finding were not in issue in this cause.

Second. Said defendant excepts to the 4th finding of said special master herein, for the reason that said finding is immaterial and inconsistent with the 3rd finding of said special master in this cause and not warranted by the evidence in this cause.

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Third. Said defendant excepts to the 5th finding of the special master in this cause, because the same is immaterial.

Fourth. Said defendant except' to the 6th finding of said special master herein, because said finding is immaterial and inconsistent with the second finding herein, and is not supported by the evidence in this cause.

Fifth. Said defendant excepts to the 5th finding of said special master herein, because the same is immaterial and inconsistent with the second finding herein, and unsupported by any competent evidence in this cause.

Sixth. Said defendant excepts to the 9th finding of said special master herein, for the reason that said finding is immaterial and inconsistent with the second finding of said master, and unsupported by any competent evidence in this cause.

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Seventh. Said defendant excepts to the 10th finding of said special master, for the reason that said finding is immaterial and unsupported by any competent evidence, and is inconsistent with the 2nd finding by said master.

Eighth. Defendant excepts to the 12th finding of said special master, because the same is immaterial and is not supported by any competent evidence in this cause, and because it appears from the evidence taken in this cause that this court as a court of equity has no jurisdiction in this cause.

Ninth. Said defendant excepts to the entire report of said special master—

1st. Because it appears that said master proceeded to take evidence in this cause when there was no replication on file in this cause and the cause *and the cause* then stood for hearing on the bill of complaint and the answer herein.

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2nd. Because it appears that this court has no jurisdiction of this cause as a court of equity.

3rd. Because said special master erred in receiving any evidence in this cause over the objections of defendant.

4th. Because it appears that the contract of dissolution of partnership between complainant and defendant was in writing, and it in no way appears that any mistake was made in executing said contract.

5th. Because the said master erred in considering any evidence over the objection of defendant as to the terms of the dissolution of the said partnership, except the written agreement between the parties.

6th. Because no decree has ever been made in this cause opening the account as stated between complainant and defendant.

7th. Because the special master considered incompetent evidence in this cause over the objections of the defendant.

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8th. Because all the allegations in the answer must be taken as true.

9th. Because said special master received and considered evidence tending to dispute and overthrow the allegations of the answer herein.

10th. Because upon the whole report it appears that this court as court of equity has no jurisdiction of this cause.

Wherefore this defendant prays that his exceptions herein may be considered by the court and that the said report may be set aside, and that this cause may be dismissed.

CHARLES H. HUTTON,
Complainant.
By S. W. DOWNEY AND W. W. CORLETT,
His Solicitors.

Endorsed on back as follows: "No. 305, viz: Edward Ivinson vs. C. H. Hutton. Exceptions to report of special master. Filed Feb'y 10th, 1874. J. W. Meldrum, register in chancery. W. W. Corlett, S. W. Downey, att'y & sol. for defendant."

146 *Motion to confirm master's report.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, second judicial district.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In equity.

Comes now the plaintiff in the above-entitled action and moves the court here to confirm the report of the special master heretofore filed in this court, and to enter up a decree in accordance with the findings therein.

EDWARD IVINSON,
By his solicitor, J. W. KINGMAN.

Endorsed on back as follows, viz: "Edward Ivinson vs. Cha's H. Hutton. In equity. Motion to confirm report of master & for decree. Filed Feb'y 14, '74. J. W. Meldrum clerk. J. W. Kingman, solicitor for pl'ff."

147 *Replication.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, second judicial district. February term, 1874.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In chancery.

And now at this February term of said court, by special leave of the chancellor, the plaintiff files this his replication to the defendant's answer herein as of the last September term of said court.

The said plaintiff says that his bill is true, and the defendant's answer, as set forth, is not true, and this he is ready to prove.

EDWARD IVINSON,
By his att'y, J. W. KINGMAN.

Endorsed on back as follows, viz: "Ivinson vs. Hutton. Replication filed Feb'y 16th, 1874. J. W. Meldrum, clerk. J. W. Kingman, att'y for pl'ff."

148 *Decree.*

TERRITORY OF WYOMING,
County of Albany, ss:

District court, second judicial district.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In equity.

And now on this fourteenth day of February, A. D. 1874, it being one of the regular days of the February term of said court, this cause came on to be heard and determined upon the report of the special master heretofore appointed to take the testimony in the case, and to report the same to this court with his findings thereon. And the parties, and their counsel, being all present, and having been fully heard, and having considered the said report and the evidence therewith submitted, and the exceptions, motions, and arguments of counsel, it is hereby ordered, adjudged, and decreed that the said report of said special master be in all respects confirmed and sustained, and that the contract for the dissolution of the co-partnership between the said Hutton and Ivinson, together with all other papers, instruments, agreements, notes of hand, and mortgages made and executed by them at
149 that time and in pursuance of their said agreement to dissolve be reformed and corrected in accordance with the findings of said special master in his said report. And that the note of hand for thirteen thousand five hundred and eighty-two dollars and fifty-four cents given by the said Charles H. Hutton to the said Edward Ivinson, on said eleventh day of April, 1873, be, and the same is hereby, ordered, adjudged, and decreed to be reformed and corrected so as to read in conformity with the true intention and agreement of said parties as follows, to wit:

$17,618.66.] LARAMIE CITY, *April 11th*, 1873.

For value received I promise to pay Edward Ivinson, or order, on or before the first day of September next, the sum of seventeen thousand six hundred eighteen dollars and sixty-six cents, with interest at the rate of two per cent. per month till paid; and if said sum of money and the interest is not paid on or before the said first day of September, I agree to pay one per cent. per month after that date in addition to said two per cent. until paid.

CHARLES H. HUTTON.

And that the condition of the mortgage given by said Hutton to said Ivinson to secure the payment of said note of $13,582.54 be re-
150 formed and corrected so as to secure the payment of said reformed note as above set forth, and that the said mortgage be held and continued to read the same as it would have read had said reformed note been originally recited and described in the condition thereof instead of note for $13,582.54.

And it is further ordered and decreed that the plaintiff in this action recover his costs herein, together with his costs before the master and the master's fees and charges, and the same shall be taxed by the clerk of this court on evidence to be submitted by the plaintiff, and execution

shall issue therefor against the defendant unless the same be paid by him within sixty days.

Witness my hand and the seal of said court the day and year above written:

[SEAL 2 DIST., ALBANY CO.] E. A. THOMAS,
Presiding Judge of said Court, &c.

Endorsed on back as follows, to wit: "Edward Ivinson vs. Charles H. Hutton. Decree. Filed March 17, 1874. J. W. Meldrum, register in chancery.

151 TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON, COMPLAINANT,
vs.
CHARLES H. HUTTON, DEFENDANT.

I, J. W. Meldrum, clerk of the district court of the 2nd judicial district, in and for the county and Territory aforesaid, do hereby certify that on the 23rd day of March, A. D. 1874, came the defendant herein, by his solicitor, Stephen W. Downey, and filed in this office a notice of appeal, of which the foregoing is a true and correct transcript, and upon the filing of such notice as aforesaid did cause a minute thereof and of the date of such filing to be made in said cause upon the appearance-docket of said court, in compliance with section 793, Code of Civil Procedure, Laws of Wyoming Territory."

Witness J. W. Meldrum, clerk of said court, and the seal thereof hereto attached, this 29th day of April, A. D. 1874.

[2ND DIS'T COURT SEAL.] J. W. MELDRUM,
Clerk 2nd District Court.

152 *Notice of appeal.*

In the district court of the 2nd judicial district.

TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON, COMPLAINANT,
vs.
CHARLES H. HUTTON, DEFENDANT. } In chancery.

Decree made on the 17th day of March, A. D. 1874.

Notice is hereby given that the defendant in the above-entitled case desires an appeal from the decree made in said case on the 17th day of March, A. D. 1874, and now desires a minute made thereof.

STEPHEN W. DOWNEY,
Sol. for Defendant.

Endorsed on back as follows, to wit: "No. 305. Ed. Ivinson, complainant, vs. C. H. Hutton, defendant. Notice of appeal. Filed March 23d, 1874. J. W. Meldrum, register in chancery. S. W. Downey, sol. for defendant."

153 *Journal entry.*

At a regular term of the district court of the first judicial district of

the Territory of Wyoming, begun and held at Laramie City, within and for the county of Albany, according to law, on the 3d day of September, A. D. 1873, there were present Hon. J. W. Fisher, chief justice, presiding; T. J. Dayton, sheriff; J. W. Meldrum, deputy clerk.

Be it remembered that the following proceedings were had, to wit:

WEDNESDAY, *September 10th*, A. D. 1873.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } 305. In chancery.

And now, on this 10th day of September, A. D. 1873, it being one of the formal days of our said court, this cause coming on to be heard upon the demurrer of the defendant herein filed, after hearing the argument of counsel in this behalf, it is ordered by the court that the
154 said demurrer be sustained, and it is further ordered by the court that plaintiff have leave to amend his bill of complaint herein.

MONDAY, *September 15th*, 1873.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } Chancery.

Comes now the plaintiff, by his counsel, and moves the court that defendant may be ordered to plead to plaintiff's amended bill of complaint filed in this cause, and after hearing the argument of counsel in this behalf, it is ordered by the court that the said motion be allowed, to all of which the defendant by counsel excepts.

TUESDAY, *September 16th*, 1873.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } 305. Chancery.

And now, on this 16th day of September, A. D. 1873, this cause
155 coming on to be heard upon the motion of the plaintiff, herein filed, to strike from files defendant's demurrer to plaintiff's amended bill of complaint herein, and after hearing the argument of counsel in this behalf, it is ordered by the court that the said motion be overruled; and it is further ordered by the court that the said demurrer also be overruled and that defendant file his answer herein on the morning of the 17th inst., to all of which ruling and order of the court in so overruling the said demurrer and so ordering, defendant, by counsel, then and there excepted.

FRIDAY, *September 19th*, 1873.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } 305. Chancery.

It is ordered, adjudged, and decreed by the court that this cause be, and the same is hereby, referred to Jason B. Brown, who is appointed special master in chancery of this court to take the proof of the respective parties.

That the said master cause to come before him all such wit-
156 nesses as the respective parties may desire and to examine the same on oath and reduce their testimony to writing and report the same to this court at the next term thereof with his findings thereon.

JOSEPH M. CAREY, *Judge.*

157 At a regular term of the district court of the first judicial district of the Territory of Wyoming, begun and held at Laramie City, within and for the county of Albany, according to law, on the second day of February, A. D. 1874, there were present, honorable E. A. Thomas, presiding; Frank Wolcott, U. S. marshall Wyo. Ter.; T. J. Dayton, sheriff Albany County; J. W. Meldrum, clerk.

Be it remembered that the following proceedings were had, to wit:

TUESDAY, *February 17th*, 1874.

EDWARD IVINSON
vs. } 305. Chancery.
CHARLES H. HUTTON.

And now, on this 17th day of February, A. D. 1874, came the parties to this cause by their attorneys, whereupon came on to be heard the motion of the plaintiff to confirm the report of the special master hereinbefore submitted in this cause, and after argument of counsel thereon, it is ordered by the court that the plaintiff be permit-
158 ted to file his replication in this behalf, to all of which ruling and order of the court in so permitting the said plaintiff to file his said replication, the defendant by counsel then and there excepted.

MONDAY, *March 16th*, A. D. 1874.

EDWARD IVINSON
vs. } In chancery.
CHARLES H. HUTTON.

And now, on this 16th day of March, A. D. 1874, come the parties to this action by their attorneys, and it is ordered, adjudged, and decreed by the court, that the report of the special master, Jason B. Brown, heretofore submitted and filed in this cause, be, and the same is hereby, confirmed, to all of which order, judgment, and decree of the court in so confirming said special master's report, the defendant by counsel then and there excepted.

TUESDAY, *March* 17, 1874.

159 *Decree.*

District court, second judicial district.

TERRITORY OF WYOMING,
County of Albany, ss:

EDWARD IVINSON
vs. } In equity.
CHARLES H. HUTTON.

And now on this fourteenth day of February, 1874, it being one of the regular days of the February term of said court, this cause came on to

be heard and determined upon the report of the special master heretofore appointed to take the testimony in the case, and to report the same to this court with his findings thereon, and the parties and their counsel being all present, and having been fully heard, and having considered the said report and the evidence therewith submitted, and the exceptions, motions, and arguments of counsel, it is hereby ordered, adjudged, and decreed that the said report of said special master be in all respects confirmed and sustained, and that the contract for the dissolution
160 of the copartnership between the said Hutton & Ivinson, together with all the other papers, instruments, agreements, notes of hand and mortgages, made and executed by them at that time and in pursuance of their said agreement to dissolve reformed and corrected in accordance with the finding of said special master in his said report. And that the note of hand for thirteen thousand five hundred and eighty-two dollars and fifty-four cents, given by the said Charles H. Hutton to the said Edward Ivinson, on said eleventh day of April, 1873, be, and the same is hereby, ordered, adjudged, and decreed to be reformed and corrected, so as to read, in conformity with the true intention and agreement of said parties, as follows, to wit:

$17,618.66.] LARAMIE CITY, *April 11th*, 1873.

For value received I promise to pay Edward Ivinson, or order, on or before the first day of September next, the sum of seventeen thousand six hundred eighteen dollars and sixty-six cents, with interest at the rate of two per cent. per month till paid, and if said sum of
161 money and the interest is not paid on or before the first day of September, I agree to pay one per cent. per month after that date in addition to said two per cent., until paid.

CHARLES H. HUTTON.

And that the condition of the mortgage given by said Hutton to said Ivinson to secure the payment of said note of $13,582.54 be reformed and corrected so as to secure the payment of said reformed note as above set forth, and that the said mortgage be held and construed to read the same as it would have read had said reformed note been originally recited and described in the condition thereof, instead of said note for $13,582.54.

And it is further ordered and decreed that the plaintiffs in this action recover his costs herein, together with his costs before the master, and the master's fees and charges, and the same shall be taxed by the clerk of this court on evidence to be submitted by the plaintiff, and execution shall issue therefor against the defendant unless the same be paid by him within sixty days.

162 Witness my hand and the seal of said court the day and year above written.

[SEAL.]

E. A. THOMAS,
Presiding Judge of said Court.

MONDAY, *April 27th*, 1874.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } Chancery.

In equity.

It appearing to the court that the decree rendered in this case is

dated the 14th day of February, A. D. 1874, and was not rendered until the 17th day of March, A. D. 1874, it is hereby adjudged and decreed that said decree be corrected in this re'pect, and that it be dated as of the day it was rendered, to wit, the 17th day of March, A. D. 1874.

E. A. THOMAS,
Judge, &c.

163 TERRITORY OF WYOMING,
County of Albany, ss :

I, J. W. Meldrum, clerk of the district court of the second judicial district, in and for the county and Territory aforesaid, do hereby certify that the within and foregoing is a true and correct transcript of the record in the case entitled Edward Ivinson vs. Charles H. Hutton, (in chancery, numbered 305,) so full and entire as the same remains on file and of record in my office.

Witness J. W. Meldrum, clerk district court, 2d judicial dist., and the seal thereof hereto attached this 29th day of April, A. D. 1874.

ALBANY COUNTY DIST. COURT SEAL, WYO. TY.

J. W. MELDRUM,
Clerk 2nd Judicial District.

(Endorsed on the back as follows:) Edward Ivinson vs. Charles H. Hutton. Transcript from dist. court 2nd judicial district. Albany County. Filed July 20th, 1874. J. W. Bruner, clerk, S. C.

164 And thereafter, to wit, on the 30th day of April, A. D. 1875, the following proceedings were had in the supreme court of Wyoming Territory in the case aforesaid, in the words and figures to wit:

March term, 1875.

FRIDAY, *April 30th*, 1875.

EDWARD IVINSON
vs.
CHARLES H. HUTTON.

And thereupon this cause coming on to be heard by the court as well upon the record and proceedings herein as upon the argument of counsel, and upon consideration thereof it is now ordered and adjudged by the court that the bill of complaint herein be and is hereby dismissed.

J. W. FISHER,
Chief Justice Wyoming Territory.

165 And thereafter, to wit, on June 24th, 1875, there was filed in the clerk's office of the supreme court of Wyoming Territory, in the said case of Edward Ivinson vs. Charles H. Hutton, an opinion in the words and figures following, to wit:

Bill in equity brought by appeal from Albany County.

EDWARD IVINSON
vs.
CHARLES H. HUTTON.

This was an appeal from the district court of Albany County.

The parties had been partners in the buying, raising, and selling of cattle, horses, &c., under certain terms not set out either in plaintiff's bill or defendant's answer.

It is, however, set out that on or about the 12th day of April, A. D. 1873, they entered into a stipulation for the dissolution of the said co-partnership, by the terms of which they agreed that the defendant was to pay the amount which the plaintiff had contributed to the
166 capital of the firm and five thousand dollars in addition thereto as a bonus for the use of plaintiff's money and his services as a member of the firm. The bill originally alleged that *that* upon a statement of the accounts being made by the clerk of the firm that they agreed that if any error should be discovered that they would mutually correct it.

The plaintiff's bill alleged that on the evening of the day on which the contract of dissolution was signed by the parties that a mistake was discovered by the accountant by which the plaintiff had lost by the terms of the statement $4,036.12. That on the attention of the defendant being called to the alleged error that he promised to re-examine the account and correct the error, but that he had failed and refused to do so. Whereupon the plaintiff filed his bill for the purpose of compelling a correction of the alleged error. The case coming on to be heard, defendant, by his counsel, filed a demurrer to plaintiff's bill on the
167 ground that the plaintiff had his remedy in a common law action upon defendant's promise, which demurrer *which demurrer* was sustained. Plaintiff then obtained leave to amend his said bill, which he did by erasing the alleged promise. Defendant filed a demurrer to the amended bill, which was overruled, and defendant required to answer, which ruling defendant excepted to and is assigned as error.

A special master was appointed to take testimony and report to the court, to which exceptions was taken, on the ground that no replication had been filed to defendant's answer. The parties, however, agreed upon the special master. The master gave notice, and the parties met and took their testimony, and the master made his report, in which he found the whole amount of plaintiff's claim to be due and owing by defendant.

The plaintiff then filed his replication as of the preceding term; and the court awarded a decree in accordance with the special master's finding. To all of which the defendant's counsel duly excepted,
168 and presented their bill of exceptions to this court, in the form of a petition in error, assigning a large number of errors, many of which it will not be necessary to examine. The first error assigned is as follows: Because the amended bill was not properly made, and left the bill as amended without being sworn to; because, when the court made the order, the defendant under the statute was entitled to notice of the filing of the amended bill, said notice to be served on him, and after receiving such notice was not bound to file an answer until the fifth Monday thereafter; but neither the notice nor time was given.

Second. That the court below erred in overruling defendant's demurrer to the amended bill.

Third. That the court erred in referring the case to a special master, when on the pleadings there was no issue of fact upon which evidence should be taken, there being no replication on file in the case at
169 the time. Besides, no authority can be given to a *a* master in this Territory to report findings of fact from evidence taken before him. See Code of Civil Proceedings 1869, section 759.

Fourth. That the court erred in permitting the complainant to file a

replication after the evidence was all taken and the case ready for hearing and argument on the report of the master and the evidence, & cites Daniels' Chancery Pleadings & Practice, page 826; Childs vs. Horr, Clark's Iowa R., page 432; Rogers vs. Mitchell, 41, N. H. 154; Pierce vs. West, 1 Peters, C. E. R., 531; Pickett v. Chilton, 5 Minn., 467; Scott v. Clarkson, 1 Bibb, 1 Ren., 277.

Fifth & sixth. That the court erred in confirming the report of the special master & entering a decree for the complainant in the case.

Opinion by FISHER, C. J.:

The plaintiff's bill, as originally filed, clearly presented grounds for a common law action in assumpsit upon a new promise made after the signing of the contract for a dissolution of the partnership which
170 had existed between the parties to this suit, and the amendment to the bill being made by a simple erasure of the allegation which gave jurisdiction to a common law court, we think was not such an alteration as changed the jurisdiction from a court of law to that of a court of chancery; hence, if the plaintiff had his remedy in a court of law, the defendant's second demurrer should have been sustained for want of jurisdiction in a court of equity.

If this is a correct view of the case, it would be sufficient to justify a dismissal of pl'f's bill without examining any of the subsequent errors complained of.

But, whether this is so or not, we are clearly of the opinion that the court erred in compelling the defendant to answer the plaintiff's bill without allowing him the time provided by the statutes of this Territory. See laws of 1873, sections 667–8.

Another error complained of is that there was no engrossment of the amended bill, nor was the bill as amended sworn to. The nature
171 of the amendment being simply certain erasures of the allegations of the original bill, it may be contended that it was not necessary that the bill as amended be sworn to, inasmuch as there was no new matter set out, but the statute requires not only that the bill should be sworn to, but that the defendant was entitled to the time given to answer, viz, the fifth Monday after the amendment to the bill was filed.

These errors might be cured by sending the case back to the district court, but we are of the opinion that the plaintiff being entitled to bring his action in assumpsit in a court of law he can have no jurisdiction in a court of equity, and that he cannot obtain jurisdiction in such court by simply erasing a substantial allegation from his bill.

Another error complained of is that the case was referred to a master to take testimony before any replication was filed, and consequently before the case was at issue, but the record does not show that
172 the question was raised at the time that the application was made for the appointment of the special master. It was, however, raised at the time that the master met the parties for the purpose of taking the testimony, and so noted on the record.

The record shows that the special master not only heard and reported the evidence to the court, but that he passed judicially upon various questions which arose during the hearing, and presented a finding upon the facts proved. This was beyond the power of the special master by the provisions of the code of Wyoming. The duties of a special master are to simply take the testimony and report the facts to the court for its action, and not to return his findings upon the evidence.

The pl' f't's bill allowing that a court of equity had jurisdiction is defective, in the fact that the action was based upon the alleged wrongful statement of an account between the parties; therefore the first
173 prayer of the bill should have been to have the statement opened with leave either to surcharge, falsify, or correct in some particu', and the particular item or items of the account to be amended should be pointed out so that the chancellor might readily see wherein the statement was defective. None of these things are prayed for in pl't'ff's bill.

The plaintiff comes into court asking the correction of the statements specified in the contract, but proceeds to set up and prove a contract entirely different from the one on which the action is based; and although the amended bill strikes out the alleged promises on the part of the defendant to correct any error which might be discovered by a re-examination of the accounts between the parties, yet a large portion of the evidence goes to the maintenance of such a promise, hence the testimony, or at least a large portion of it, is not responsive to the allegations of the bill.

Finding the bill thus defective and uncertain in so many par-
174 ticulars, we might send it back to the court below for correction, but finding the pl'ft has a clear remedy in a common law court—this court, if that be so, can have no jurisdiction. We are constrained to refer the plaintiff to his remedy at law and dismiss the bill.

Endorsed on the back as follows: "Edward Ivinson vs. Charles H. Hutton. Opinion. Filed June 24th, 1875. J. W. Bruner, cl'k Supreme Court.

And on May 10th, 1875, there was filed in the clerk's office of said Supreme Court a notice of appeal in the words and figures following, to wit:

Notice of appeal.

TERRITORY OF WYOMING:

Supreme Court, March term, 1875.

EDWARD IVINSON
vs.
CHARLES H. HUTTON. } In equity.

175 To the said defendant and to the clerk of said supreme court:

Take notice that the above plaintiff hereby claims an appeal from the judgment and decree of said supreme court in the above entitled cause, rendered on the thirtieth day of April, A. D. 1875, at said March term of said court, against said plaintiffs, to the Supreme Court of the United States.

Dated this first day of May, 1875.

J. W. KINGMAN,
Solicitor for Pl'f.

The appeal in the foregoing cause is hereby allowed.

J. W. FISHER,
Chief Justice of Wyoming Territory.

Endorsed on the back as follows: "Edward Ivinson vs. Charles H. Hutton. Notice of appeal. Filed May 10th, 1875. J. W. Bruner, clerk sup. court."

176 And on the same said 10th day of May, A. D. 1875, there was filed in said clerk's office of said supreme court a bond in the words and figures following, to wit:

Know all men by these presents that we, Edward Ivinson and H. B. Rumsey and N. C. Worth, are held and bound unto Charles H. Hutton in the full and just sum of one thousand dollars, to be paid to the said Charles H. Hutton, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this first day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the supreme court for the Territory of Wyoming, in a suit depending in said court between Edward
177 Ivinson, plaintiff, and Charles H. Hutton, a decree was rendered against the said Edward Ivinson, and the said Edward Ivinson having taken an appeal and filed a notice thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit, and having obtained a citation directed to the said Charles H. Hutton, and to W. W. Corlett, esq., his att'y of record, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Edward Ivinson shall prosecute his appeal to effect and answer to all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals the day and year above written.

E. IVINSON. [L. S.]
H. B. RUMSEY. [L. S.]
N. C. WORTH. [L. S.]

Sealed and delivered in presence of—
C. B. ROOT.

Approved by—

178 J. W. FISHER,
Chief Justice of Wyoming Territory.

Endorsed on the back as follows: "Doc. 1, S. C. No. 63. Edward Ivinson vs. Charles H. Hutton. Bond. Filed May 10th, 1875. J. W. Bruner, cerk S. C."

And thereafter, on May 12th, 1875, there was a citation filed in the said clerk's office of said Supreme Court, in the words and figures following, to wit:

The United States of America to Charles H. Hutton and to W. W. Corlets, esq., his att'y of record, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to an appeal, filed in the clerk's
179 office of the supreme court of Wyoming Territory, wherein Edward Ivinson is appellant, and you, the said Charles H. Hutton,

are appellee, to show cause, if any there be, why the judgment and decree rendered against the said appellant as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable J. W. Fisher, chief justice of Wyoming Territory, this 10th day of May, A. D. 1875.

[SUPREME COURT SEAL WYO. T'Y.] J. W. FISHER,
Chief Justice.

J. W. BRUNER,
Clerk of the Supreme Court of Wyoming Territory.

On this 11th day of May, in the year of our Lord 1875, personally appeared J. W. Kingman before me, the subscriber, clerk supreme court, and made oath that he delivered a true copy of the within citation to W. W. Corlets, esq., counsel within-named on the 11th day of May, A. D. 1875.

J. W. KINGMAN.

Subscribed and sworn to before me this 11th day of May, A. D. 1875.

J. W. BRUNER,
Clerk Supreme Court.

Endorsed on the back as follows: "Edward Ivinson vs. Charles H. Hutton. Citation. Filed May 12th, 1875. J. W. Bruner, clerk sup. court."

TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Bruner, clerk of the supreme court of Wyoming Territory, do hereby certify that the foregoing pages contain true and correct copies of the transcript journal entry of said court of dismissing bill, opinion of court, notice of appeal, bond, and citation in the case of Edward Ivinson vs. Charles H. Hutton, so full and entire as the same remains on file and of record in the office of said supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Cheyenne City, this 15th day of September, A. D. 1875.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Fisher, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, now is, and was at the time signing and sealing the same, the clerk of said supreme court, and keeper of the seal and records thereof, duly appointed and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such in all courts of record in the United States and elsewhere; that I am well acquainted with his signature, and verily believe the name subscribed to the foregoing certificate is

his signature, and that said certificate is in due form of law and by the proper officer.

Witness my hand this 15th day of September, A. D. 1875.

J. W. FISHER,
Chief Justice Supreme Court Wyoming Territory.

TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Bruner, clerk of the supreme court of Wyoming Territory, do hereby certify that J. W. Fisher, esq., whose name is subscribed to the foregoing certificate, was at the time of the date thereof the
183 chief justice of said supreme court, duly commissioned and qualified as such, and that his signature thereto is genuine.

Witness my hand and the seal of said supreme court hereto attached at Cheyenne City, in said Territory, this 15th day of September, A. D. 1875.

[SEAL.]

J. W. BRUNER,
Clerk Supreme Court.

(Indorsement on cover:) No. 324. Edward Ivinson, appellant, vs. Charles H. Hutton. Wyoming Ter't'y supreme court. Filed 7th December, 1875.

REC. 324—5

In the Supreme Court of the United States.

EDWARD IVINSON, APPELLANT,

against

CHARLES H. HUTTON, APPELLEE.

Appeal from the Supreme Court of Wyoming Territory.

BRIEF FOR APPELLANT.

BY

SHELLABARGER & WILSON,
His Counsel.

WASHINGTON, D. C.:
West End Printing House, 833 Twentieth Street.
1878.

In the Supreme Court of the United States.

EDWARD IVINSON, APPELLANT,

against

CHARLES H. HUTTON, APPELLEE.

Appeal from the Supreme Court of Wyoming Territory.

BRIEF FOR APPELLANT.

BY

SHELLABARGER & WILSON,
His Counsel.

WASHINGTON, D. C.:
West End Printing House, 833 Twentieth Street
1878.

In the Supreme Court of the United States.

IN EQUITY.

EDWARD IVINSON, Appellant,

vs.

CHARLES H. HUTTON, Appellee.

Appeal from Supreme Court of Wyoming Territory.

Statement of the Facts.

1. In this case the bill avers that appellant and appellee were partners for the purpose of carrying on the business of stock and cattle raising in Albany County, Wyoming Territory, and the business and its accounts were large.

2. Appellant had put into the partnership $51,075.66 and had received $7,257.00 from the partnership.

3. On the 11th of April, 1874 the partnership was disolved by mutual consent, upon the following terms: (a) The appellee was to pay to the appellant all the money he had advanced, after deducting such sums as he had already received, and the further sum of $5,000.00; and was to pay *or secure* the payment of all debts or liabilities due and owing by the firm.

4. The appellant was to release, assign and convey to the appellee all of the former's interest in the partnership property of every description; (c) neither party knowing what amount had been put in the firm by the appellant, they further agreed that their clerk should examine the books, and ascertain the amount that appellant had taken out, and should furnish them

the footings up, and any mistake that might be made should be corrected when discovered.

4. The clerk handed them as the result of his footings the sum of $47,039.54 as the amount to be paid to appellant.

5. This amount was placed in a written agreement of dissolution, so to be paid by appellee to appellant.

6. After the paper had been signed and delivered, by the parties, which contained this amount as the amount to be paid by appellee to appellant and after appellant had made the assignment required by said disolution, and the other papers called for by said disolution, and on the evening of the same day the clerk discovered that he had made a mistake of $4,036.12; and that the true balance in favor of appellant was $51,075.66.

7. Thereupon the appellee "promised and agreed that he would *re-examine said accounts and would rectify all mistakes or errors that might be found therein, and would make it all right with" the appellant "if he had not already done so.*"

The foregoing are the facts of the case as stated in the bill. See Record pp. 1 and 2.

8. The bill was subsequently amended by striking out the alleged promises to correct any error. See Record p. 5.

9. The prayer of the bill was, that *an account be taken* under the direction of the Court to ascertain the exact and just amount due the appellant, and to *correct the agreement, release and other writings delivered by the appellant to the appellee, and that that appellee might be decreed to pay to appellant the sum of* $4,036.12, *the amount of the mistake aforesaid.* Record p. 2 and 3.

10. To this bill a demurrer was filed, considered and overruled. See p. 45 Record.

11. Appellee answered, (see page 7, Record,) in which he denies most of the material averments of the bill—denies the alleged mistake and that said writing required to be referred, &c. Record p. 7.

12. The case was referred to a master to take the testimony and report to the Court. Record p. 11.

13. The master took the testimony, made his report to the Court, together with the testimony, in which report he finds the facts to be substanially as alleged in the amended bill. See Record pp. 12, 13, 14.

14. Upon this report and the evidence filed therewith, and and exceptions to said report, (Record p. 40,) the case came before the Court, a replication having been filed by leave of the Court, (Rec. p. 41,) and a decree was rendered in favor of appellant, substantially as prayed for correcting said instruments, but not rendering a money decree. Record p. 42.

15. From this decree appeal was taken by appellee to the Supreme Court of the Territory, and that Court *dismissed the bill* upon the ground that the appellant's remedy was in an action at law, and not by bill in Chancery. See Record p. 45.

16. Various questions were raised by the appellee, during the trial in the District Court, on the ruling of the Court in regard to the *practice* under the code of the Territory; as, for example, that the findings in the report of the master were inconsistent; that the evidence was taken before replication, (Record p. 40;) that the time allowed by Code for answer after amendment of bill was not given.

But these questions are not, we think, material to be stated here, for the reason that if the District Court erred in regard to them, and the case was one of equitable jurisdiction, the Supreme Court of the Territory should have reversed the District Court, and sent the case back to the District Court for the correction of said errors, and should not have dismissed the bill.

Assignment of Errors.

1. The Court erred in dismissing the bill.

2. The Court erred in holding that the case was not one of equitable jurisdiction, and that the appellant's remedy was at law; and in dismissing the bill upon that ground.

3. There are other manifest errors in said record.

Brief.

The single proposition which we shall maintain in this brief

is this, that even conceding there was error in the rulings of the District Court in regard to the matters of practice, as presented by the record, other than that as to whether the case was one for equitable relief, then, there is error in this record for which the Supreme Court must be reversed, in this, to wit: that the case was one of equitable jurisdiction, and being such it was error to dismiss the bill, because, conceding that the District Court erred in said other matters of practice, still since the case is one of equitable cognizance, the judgment should have been one reversing the District Court, and remanding the case for trial, and should not have dismissed the bill.

The dismissal here was not one without prejudice, but was on the merits and final.

The single legal inquiry which we make is, therefore, whether the suit was properly brought in equity.

Now, please note the elements of this case, as presented in the original and amended bills.

It showed a partnership, involving all the usual qualities of large and protracted partnership accounts.

It shows an oral agreement, (Record p. 1,) by which this partnership was to be dissolved on the following terms: that appellant, Ivinson, should release to appellee, Hutton, all of Ivinson's interest in the partnership assets; that Hutton should pay Ivinson the balance of all which Ivinson had contributed to the firm's business, after deducting all he had drawn out for his own use, thus making a full accounting as to said amounts contributed and withdrawn, indispensable to the ascertainment of such balance, and to this balance was to be added five thousand dollars; that Hutton was to pay or secure the partnership debts, (Record p. 13;) that in consummating said agreement of dissolution all the deeds, mortgages, releases, notes of hand and agreements necessary to complete and perfect said dissolution were to be executed and delivered. Record p. 1.

The record further shows that the parties attempted to state the account, and strike the balance so to be paid by Hutton to Ivinson, through the agency of their clerk, and that they exe-

cuted said agreed instruments, according to a balance found by that clerk. The record further shows that a material mistake, by said clerk, was made in stating that account, and that this mistake was incorporated in said papers, see for example, Exhibit "A," (Record p. 6,) whereby $47,039.54, was to be paid Ivinson, whereas it should have been $51,075.66, (Record pp. 10 and 13,) and that it was originally agreed (before the writing of dissolution was signed) that any errors made by said clerk should be corrected. (Record p. 14.) The record further shows that said releases and other papers were made under the influence of, and incorporated said mistake, and that when the mistake was discovered it was promptly reported by Ivinson to Hutton, and that Hutton then promised—not that he would pay a liquidated sum of $4,036.12, or any other sum, but only, on the contrary, that "*he would examine said accounts, and would rectify any and all mistakes and errors that might be found therein, if he had not already done so, (according to the agreement he had made with him before the execution of the paper aforesaid.*") Record 2.

The prayer of the bill is "that an *account may "be taken of the late partnership business so as to ascertain the exact and just amount due plaintiff by the defendant on account of their late partnership business, in accordance with the terms of their dissolution aforesaid, and that the agreement, releases and other writings executed by the plaintiff and delivered to the defendant under the mistake and error above set forth may be corrected, amended or cancelled according to the fact and truth of the case and as to justice shall appertain*, and that defendant may be decreed to pay to your orator said sum of $4,036.12" &c., &c.

Such, substantially, was the case which went to the Supreme Court and which it ordered dismissed, because not a case in equity.

Did it present a case for equitable cognizance? For the purpose of our first point let it be assumed that this was not a bill for the settlement of a general partnership account, but, on the other hand, that the alleged agreement to dissolve

dispensed with an account, generally ascertaining the profits and losses of the business, the liability of the concern, the contribution and receipts by the partners, and the ascertainment of the ballance due each, then, and in that case, what did this agreement to disolve, and the subsequent promise of Hutton to examine the accounts and correct mistakes, leave, in the way of unsettled account, which this bill seeks to settle? Manifestly it left to be settled in an accounting at least.

1. All the contributions of Ivinson to the firm.

2. All the receipts of Ivinson from the firm, and a determination of how much of these were for his own use.

3. An ascertainment of what firm debts Hutton became bound to pay, or to secure Ivinson against liability for.

Here, then, is what in the way of settling partnership accounts, was left to be done by the terms of this dissolution and of said promise of Hutton to correct the mistake. Do these facts bring the case within the class of which it is said (10 Ed. of 1 Story on Eq., Sec. 442 *a.*) "As courts of equity entertain concurrent jurisdiction *to the fullest extent* with courts of law, in matters of account, the decision as to the proper tribunal must be governed by consideration of convenience. A demurrer to a bill seeking an account of goods sold by the defendant on which the plaintiff was entitled to a commission was here overruled with costs.

Shepherd *vs.* Brown, 4 Giffard, 208.

To this element of the case made by the bill, that it calls for the settlement of complicated partnership accounts, must be added this other that the bill was framed so as to authorize the prayer, and the prayer was made that in addition to the settlement of the account, there should be a decree for the specific performance of the appellee's agreements with Ivinson, and that he should pay or secure the payment of all unpaid partnership debts; that the deeds, mortgages, and notes of hand agreements, contemplated by, and made under, said disolution, should be "corrected, amended or cancelled, according to the fact and truth."

There is, therefore, first, an accounting called for, wherein equity has, *at least*, concurrent jurisdiction with courts of law, to which is superadded a case for relief in the way of reforming instruments founded in mistake, decreeing the giving of security against the partnership debts, ascertaining the extent and character of the debts, the specific performance of said contracts, all of which are cognizable exclusively in equity.

It seems unnecessary to trouble the Court with any multiplication of authority, in showing that these elements bring the case within a most familiar equitable jurisdiction, even assuming that it is not a case for settling partnership accounts generally.

How broad and general the powers of Courts of Chancery are in the matter of reforming contracts and other instruments, so as to purge them of the taint of fraud or mistake, is well indicated in the following language of this Court in the case of Bradford *vs.* The Union Bank of Tennessee. 13 How., 66.

"One of the most common class of cases," says Judge Story, in his Commentaries on Equity Jurisprudence, "in which relief is sought in equity on account of a mistake of facts, is that of written instruments, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent y expressing something different in substanc from the truth of that intent. In all such cases, if the mistake is clearly made out by proof entirely satisfact ry, equity will reform the contract so as to make it conformable to the precise intent of the parties. And Lord Hardwick remarked in Henkle *vs.* Royal Exchange Assur. Co., (1 Ves. Sen., 317.) "No doubt this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties on proper proof that would be rectified." And see also

Oliver *vs.* Ins. Co., 2 Curtis, 277.

Hogan *vs.* Ins. Co., 1 W. C. C., 419.

Now place alongside of this familiar principle of equitable jurisdiction, the following from Fowle *vs.* Lawrason, 5 Pet., 503, which is one of the most marked of the authorities in limitation of this important jurisdiction of equity in matters of account. Chief Justice Marshall says: "That a Court of Chancery has jurisdiction in matters of account cannot be questioned. Nor can it be doubted that this jurisdiction is often beneficially exercised. But it cannot be admitted that a Court of Equity may take cognizance of *every* action for goods, ware and merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items on which various sums of money have become due, and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a Court of Chancery cannot draw to itself *every* transaction between individuals, in which an account is to be adjusted. In all cases in which an action of account would be a proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a Court of Equity is undoubted. It is the appropriate tribunal. But in transactions not of this particular character, great complexity ought to exist in the accounts, *or some difficulty at law should be interposed* some discovery should be required in order to induce the Court of Chancery to exercise jurisdiction."

And the result of the cases on this point, is, that where there are mutual accounts or the accounts are complicated, or where, in addition to an accounting, some relief of equitable cognizance, as, for example, discovery or a specific performance or reform of an instrument is also invoked, then, in every such case, equity has jurisdiction. See

Scott *vs.* Liverpool, 5 Jur., N. S., 105.

Story's Eq., Sects 456 459 and 460, and notes.

If therefore, this case be treated as one, not calling for settlement of partnership account generally, but for enforcing the discovery and correction of mistakes, and for the reform and

specific enforcement of contract, mortgages and deeds, and to these, and for the taking and settlement of those completed and long accounts which were required to be settled in order to find what contributions Ivinson had made to the firm, what he had drawn out, what debts of the partnership came within the covenant to indemnify Ivinson against partnership liabilities, then, still, this case is one so plainly, and, certainly one of equitable cognizances as to make it difficult to select a case more exactly, or, certainly, one for equitable relief.

If it is claimed that this bill is so unskillful or incomplete as not to fully make a case for such equitable interposition, then, the reply is, that were this so, yet, since the bill clearly does in substance make such a case it is error to dismiss it because of any want of art or of fullness, when the case it made was substantially one entitling the plaintiff to remain in the court of equity, and, if need be, amend his bill into higher artistic excellence or greater fullness of averment.

But we deny that the case in the bill is one outside of the family of cases for partnership settlement.

The case in the bill presents a partnership of very large and complicated accounts which had never been settled, and where there was an attempt to dissolve and to retire one partner by a contract which contemplated the taking and settlement of long and complex accounts, the ascertainment of all the partnership debts, and the giving of mortgages, notes, and other papers securing various important ends, and where the attempt so to settle and dissolve became involved in gross error, (carried into said papers,) and the whole attempt at settlement proved abortive. Upon this failure, one of the partners appeals to the Courts to (*a*) settle said accounts so not settled, (*b*) to correct said error, (*c*) to reform said instruments so incorporating said mistake, and (*d*) to specifically enforce said contract for settlement, security, payment and dissolution.

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Now, this, we insist, makes a case coming within the familiar class of cases in equity to settle accounts between partners.

To enforce the view and also indicate what we claim to be the equitable jurisdiction applicable to such cases, we may be pardoned for here referring to some of the adjudications illustrative of this jurisdiction.

In the case of Lamalere *vs.* Caze, 1 Wash. C. C. R., 435, the question was whether the action of *assumpsit* would lie. The parties were jointly interested in a particular shipment, and it was insisted on the part of the plaintiff that the partnership had been dissolved, that the defendant had acknowledged that there was a balance due from him to the plaintiff, and, therefore, the action of *assumpsit* would lie to recover that balance. The court held, that when there was an account stated and a balance agreed upon by the parties, the action would lie, otherwise not. On a motion for a non-suit, counsel for the defendant insisted "that until dissolution and an account liquidated by the partners and a promise by one to pay the balance, this action or *in debitatis assumpsit* will not lie." 2nd Durn and East, 478 479.

Counsel for the plaintiff:—

"Admitted that this action by one partner against another cannot be maintained, unless, after the dissolution, the balance was struck and a promise to pay."

The court said:—

"The law being admitted, there can be no doubt in this case, even if the evidence prove more clearly than it does, that the defendant acknowledged the balance due the plaintiff to be the $1,100.00 after deducting the $160.00. This is not a balance upon a *settled account*, for to constitute such an account all the parties must consent to it, all must be bound by it or none are. This consent must be either expressed or implied. I am inclined to think, that, if, after dissolution, one partner were to state the account and send it to the other, who should by his conduct show his acquiescence, by retaining it for a considerable time without objections, that he might be bound by that statement as well as the other, and that this action for the balance might then be maintained. But in this case the plaintiff

never did assent to the balance as stated by the defendant, but, on the contrary, claimed in this action more than the $940.00, and much more than the jury supposed to be the balance, which shows that the balance was not struck so as to bind both parties. The action then cannot be sustained."

In the case of Pote *vs.* Philips, 5 Cranch, C. C. R., 154, it was held (as stated in the syllabus) that "although the partnership accounts may have been settled and a balance acknowledged to be due by one partner to another, yet the creditor partner cannot maintain an action at law for that balance without proving an express promise by the debtor partner to pay it."

We do not contend that an express promise to pay a balance found due on settlement is necessary to enable the party to maintain an action at law, but we do contend that before an action at law can be maintained the parties must have settled and agreed upon a balance to be paid by the one to the other, and that such facts and circumstances must appear as raise an implied promise to pay the balance so stated.

In the case of McDougal *vs.* Cooper, 31, N. Y., 498, there had been an accounting between partners, a balance struck and a due bill given for the balance. A complaint for relief was filed alleging that there was a mistake in the accounting, demanding a new accounting, and that the mistake be rectified, and the defendant required to pay a specific sum of money. It was held that the action could be maintained. The syllabus states the opinion of the Court, as follows:

"Where there has been an accounting and settlement, if it afterwards appear that a clear mistake occurred by the omission to conclude a considerable sum of money an action will lie to *correct such mistake* and to collect such sum."

Actions at law *never* lie to *correct a mistake*. That is the peculiar province of a Court of Equity. Equity alone has jurisdiction for this purpose.

The case of Barry *vs.* Barry, 3 Cranch, C. C. R., 120, was an action at law to recover a balance alleged to be due on a

settlement that had been made of partnership accounts. The Court instructed the jury "that the plaintiff cannot recover in this action for partnership items, unless the partnership accounts were settled and balance struck, and a promise to pay before bringing the suit.

The case of Blankhead *vs.* Alloway, 6 Coldwell, 56, is one in which there had been a settlement between partners and a receipt given in full. The partner who gave this receipt filed a bill in equity to set aside the settlement, on the ground of misrepresentations made in making the settlement. The Court held, citing numerous authorities, that a Court of Equity would open the settlement on the ground of mistake, surprise, accident or false representations.

In the case now at bar, it will be observed that the bill is filed for the purpose of correcting a mistake that was made in making the settlement. If there had been nothing said between the parties at the time of, or after making the settlement, with reference to the correction of mistakes, equity would compel the correction.

The case of Adams *vs.* Funk, 53d Ill., 219, is directly in point. The Court there says:—

"There is, in fact, no real difference between this case and the case of a settlement between partners, in which they agree to rectify all errors, and I think the law in such a case is that in order to rectify any error or fraud in the settlement, *the only remedy is by bill in equity*, and not by action at law."

In the case of Hanks *vs.* Baker, 53d Ill., 292, the Court says:—

"It is urged that the account was taken and the balance found by Hardwick. When the parties attempted to settle, and the sum having been found, the Court of Equity will not entertain jurisdiction, and plaintiff in error can only have relief in a court of law. It is true, when partners have settled their partnership accounts and a balance is ascertained, an action of *assumpsit* will lie for money due on an account stated. In such a case there ceases to be any necessity to file a bill to

have the partnership accounts stated, as that has been done by the parties themselves; but, in this case, it will be seen that the account was not correctly stated, as it is claimed there was then due plaintiff in error, $928.50, which error was produced by allowing plaintiff in error, as capital, $433.00, which he had borrowed, and which was paid by the firm. Deduct that amount from the amount then found, and it leaves the amount we have found from the evidence. It follows there was not a balance, truly stated, such as would authorize a recovery in *assumpsit.*" See—

Mickle *vs.* Peet, 43d Conn., 65.

A careful examination of the cases which we have now cited, and of the cases brought into view by them, thoroughly establish, as we think, the following propositions material to this inquiry:

1st. That an action at law is not maintainable between co-partners, for matters entering into the partnership, or for a balance growing out of the partnership business, except where there has been a final and binding settlement, and either an express or implied promise to pay such balance.

2d. That an action at law will not lie for a balance ascertained by an alleged settlement, when such settlement is found to involve mistake or fraud, which vitiates the settlement, but in such case the fraud or mistake remits the party to a court of Equity for relief.

3d. That where it appears that an attempted settlement, as to some of its parts, was accurate and satisfactory, but as to other parts was for any reason incomplete or invalid, then a Court of Equity is the proper tribunal for the accomplishment of the final settlement; and such Court may adopt the valid parts of the settlement, and settle the residue according to right and thus finally adjust the partnership accounts by its decree.

4th. That courts of law have no jurisdiction, either to correct errors in such attempted settlements by partners, or to reform instruments, either executed or executory, which incorporate

such errors or otherwise fail to conform to the just intention of the parties.

5th. That whenever from any cause, an attempted settlement of partnership accounts, is invalid and not final, full and binding, the jurisdiction of a Court of Equity attaches to such partnership matters, and that Court has unquestionable jurisdiction to make a full and final settlement, and in every such case for correcting errors in abortive or partial settlements where instruments have been executed, incorporating the defects of such attempted settlement, it is competent for the complainant to ~~unite~~ unite in one bill, an application for the settlement of the partnership, and for the reform of said instruments.

We think these propositions will be found to be thoroughly established, and applied to the case at bar, they establish the jurisdiction of a Court of Equity over the case presented by this bill, and, hence, it was error to dismiss it.

SHELLABARGER & WILSON,

Counsel for Appellant.

Supreme Court of the United States.

EDWARD IVINSON, APPELLANT,

vs.

CHARLES H. HUTTON, APPELLEE.

APPEAL FROM THE SUPREME COURT OF WYOMING TERRITORY.

Brief in Reply.

Counsel for appellee makes the following points:

1st. That an amendment was made to the bill, and that the bill was not verified after the amendment was made. The amendment consisted in striking out that portion of the bill in which it was alleged that there had been an agreement made to correct errors. The amendment did not involve any change in the allegations of any material facts in the case. There were no new facts added by way of averment to the bill, so that all that was in the bill after the amendment was made had already been verified, and no new verification could, therefore, have been necessary; but if a verification was necessary, it was not a ground for dismissing the bill, but only a ground for reversal, giving the appellant an opportunity to correct the error.

2d. That the District Court required the defendant (appellee) to answer this amended bill sooner than he was required to answer it under the statutes of the Territory of Wyoming. There is nothing in the record indicating, nor is it claimed, that the defendant (appellee) was injured by

this action of the court. There is nothing to indicate that he was not just as ready to answer at the time he did answer, as he would have been at the end of the time claimed for him. There is nothing to indicate, nor is it claimed, that there is any defense that would have been available to him at the expiration of the time claimed under the statute, which he did not have at the time that he made his answer. He filed his answer, and had the benefit of it just the same as though he had filed it weeks later. If there was error, it was a harmless one. But if it was error, it was no ground for dismissal, but only a ground for reversal.

3d. That the evidence in the case was taken before a replication had been filed. It is conceded that no objection was made to taking the evidence before the filing of the replication, but claimed that the objection was made when the parties began to take the testimony. This was too late. When the court made the order referring the case to the master, the defendant (appellee) should then have made his objection. If made then, the court could have had the replication filed; but keeping silent then, must be construed into an assent to taking this testimony without the replication having been filed. No harm came to the defendant (appellee) by reason of this, and if he was injured by it, it was no ground for dismissing the bill, but only for reversal.

4th. It is complained by appellee that the master passed upon questions of the admissibility of testimony. In fact, this is a mistake; for it will be seen, by reference to the record, that objections were made to testimony at the time it was being taken by the master; that the objections were noted, but that the testimony was taken by the master. Where an objection was made, the master noted the objection, but proceeded to take the answer of the witness, and the question and answer were reported to the court; so that it is perfectly manifest that the testimony objected to was not ruled out by the master, but was taken, and the court, therefore, had before it the testimony. It is true,

that in the report of the master, he says that he overrules the objections (p. 14); but that is wholly immaterial, because the court had before it both the questions and the answers objected to; and notwithstanding the statement of the master, that he overruled the objections, the latter were before the court for its action in the premises.

The statement of the master, therefore, that he overruled the objections, is a matter of no consequence in the case, as it was in the power of the defendant (appellee) to have asked the court to have passed upon the question of the admissibility or inadmissibility of the testimony to which objection was made. But, as in the cases above referred to, these were no grounds for dismissing the bill, but were simply grounds for reversal of the case, for the purpose of a retrial. And as an illustration of the fact that when objections were made by the defendant (appellee), the evidence was taken when objections were made, and the whole matter presented to the court, see record, p. 15, question 6 and answer, and report, p. 14 of record. If, therefore, it be true, as it is claimed by the appellee, that the master had no powers other than simply to take the testimony and report it to the court, this record shows that the testimony was all taken; that no evidence was rejected by the master; that the whole was submitted to the court for its action, and, therefore, whatever may have been the views of the master, and even though his powers are limited as claimed, which we do not concede, no harm has come to the appellee, for the reason that the entire evidence was taken notwithstanding any views that the master may have expressed to the court in regard to the admissibility of such testimony. The most that can be claimed by appellee, is that it was the duty of the master to take the questions and answers and note the objections, and this he did.

5th. It is complained that, after the evidence had been taken, a replication was permitted to be filed. That replication will be found on page 41 of the record. It is simply an averment that the plaintiff's bill is true, and that the defendant's answer is not true. If this replication was

irregularly filed, it is no ground for dismissing the bill, but only ground for reversal.

6th. Objection is made that the record is incomplete, because it fails to set forth the mortgage which was given by the defendant (appellee) to secure the amount that was due to the plaintiff (appellant). It is impossible that this can affect this case. This mortgage was given to secure the appellant the amount due him under the settlement. Its appearance in the record is in no way essential to the determination of the questions that are before this court.

7th. It is claimed that the plaintiff's bill was defective, because it did not state the particular item or items of the account wherein the mistake alleged in the bill occurred. An examination of the bill will show that this objection has no solid foundation upon which to rest. It is distinctly averred in the bill that it was left to the clerk of these parties to ascertain from the books the amount which the defendant (appellee) should pay to plaintiff under the terms of their settlement, and that in figuring up the amount the clerk made a mistake of $4,036.12. This mistake is distinctly averred, and we deny that it is necessary to set forth in the bill any particular item of the account as to which this mistake applies. This bill does allege exactly in what the mistake consisted. It alleged that the clerk was to make up the amount to be paid by defendant (appellee) to plaintiff (appellant), and that in making up that amount he made this mistake. It is urged in appellee's brief that appellant was unable to state particularly the nature of the mistake, but this court will observe that neither the appellant nor the appellee pretended to know the exact state of the accounts, or the particulars of the accounts, between them, and the matter of determining these was left to their clerk and book-keeper, A. G. Swain. (See appellant's brief, p. 17, and record, pp. 24 and 28.)

How the mistake occurred, is distinctly set forth in the testimony of Mr. Swain. (Record, p. 18.) But suppose it to be true that the bill was defective in not stating with sufficient particularity the mistake that was made; suppose

it to be true that the particular item with reference to which the mistake occurred is not averred with sufficient particularity, that is no ground for dismissing the bill, if the bill shows a case for equitable interference, as it certainly does,—then, for defects of this kind it is not to be dismissed, and the party deprived of his rights; but it was the duty of the Supreme Court of the Territory to have simply reversed the case, in order that the bill could be made more certain.

8th. It is claimed that the court properly dismissed this bill upon the evidence adduced on the trial. It is worthy of notice here that the Supreme Court, in dismissing the bill, paid no attention whatever to the evidence in the case, but dismissed the bill regardless of the evidence, because the remedy of the plaintiff was at law, and not in equity. But, lest this honorable court shall look into the evidence of the case for the purpose of considering whether the bill should have been dismissed upon that, we briefly call attention to what is claimed by the appellee in that regard. What we have to say in regard to this case being one of equitable cognizance, we have already considered in our original brief, and will not now further consider that question. It is claimed that the alleged mistake must be clearly proved, and that if not clearly proved, the court would have been warranted in dismissing the bill on the evidence, and, therefore, upon that ground, although it was not considered by the court below, this court will affirm the judgment of dismissal. Without controverting the proposition, that in a case where a court of equity is called upon to correct a mistake, the mistake must be clearly proven, we briefly invite the attention of the court to the testimony in this case, for the purpose of showing that the mistake was clearly proven.

First, permit us to invite your attention to the discrepancies between the defendant's answer and his testimony, for the purpose of indicating to this honorable court the little weight that is to be attached to his testimony on the subject of this mistake. It will be remembered that the appellant

in his bill alleged that the appellee agreed to pay him not only the moneys that he had put into the concern, but to pay him a bonus of $5,000. (See Record, p. 1.) Now, examine the appellee's answer in the case, (Record, p. 8,) and you will find that this averment of the bill was squarely denied by the appellee, but not under oath. Now turn to page 36 of the record, and you will observe that in answer to question 3, when the defendant was testifying in the case, he distinctly admitted that he was to pay this bonus of $5,000. Recurring now to the question as to whether this mistake has been clearly proven or not, we refer the court to the evidence of A. G. Swain, page 15; of Edward Ivinson, page 23; of J. W. Kingman, page 27. This testimony shows, without here quoting it, that the agreement was between these parties, when they were negotiating for dissolution, that the appellee was to pay to appellant *all the moneys* that the latter had put into the concern, and a bonus of $5,000. As to this there can be no question, and we challenge an inspection of the other testimony in the case to find anything to contradict it. On the contrary, the appellee himself says, that "the agreement was that I should clean up all my individual indebtedness, and Harper & Co.'s. That Swain and Ivinson should figure up all I owed, including Harper & Co., and all that the firm of Hutton & Ivinson owed. Everything was to be cleaned up, then Ivinson was to make me a proposition. Mr. Swain, for Mr. Ivinson, figured up the amounts, and gave me a paper with the gross amount upon it, and also several items upon it the same as the account attached to the copy of the agreement filed with my answer in this case, except there was a little difference in the mode of payment. The gross amount stated upon the paper was $47,039.54. I accepted the proposition."

Now, according to the appellee's own statement, he was to pay to Ivinson just exactly what Ivinson says he was to pay, and just what the other witnesses say he was to pay; and according to the appellee's own testimony, as well as the testimony of the other witnesses, Swain was to make up the account. Nobody can read this testimony without

seeing that the agreement between the parties was that Ivinson (appellant) was to have his money back again; that Swain was to ascertain what the amount was; that that amount was to be inserted in the agreement of dissolution. This was what the parties intended; and in so far as the ultimate agreement was concerned, that agreement, when reduced to writing, was to contain the amount thus stipulated to be paid to the appellant. In making up this amount by Swain, he made a mistake of $4,036.12. Just how that mistake was made, is shown by Swain's testimony, at page 18; and we confidently assert that there is nothing in the other testimony in the case that casts so much as a doubt upon the fact that this mistake was made. Now, it being clearly shown to have been the intention of the parties by their agreement that appellee should return to the appellant the actual money that he had put into this concern, and it being equally clear that the amount that he did return to him was less by the sum above named than the amount he had put in, and that this grew out of this mistake of Swain's, to whom both parties had intrusted the duty of making up the amount, we submit that this is a case wherein the evidence is clear that a mistake has been made, and is therefore a proper subject of the intervention of a court of equity, and that the appellant has no other remedy than by resort to that tribunal, for the purpose of correcting that mistake.

SHELLABARGER & WILSON,
Attorneys of Appellant.

IN THE

Supreme Court of the United States.

EDWARD IVINSON, APPELLANT,

vs.

CHARLES H. HUTTON, APPELLEE.

Appeal from the Supreme Court of Wyoming Territory.

BRIEF OF APPELLEE.

W. W. CORLETT, Solicitor for Appellee.

STATEMENT.

This cause comes here by appeal from the Supreme Court of the Territory of Wyoming. The suit was begun in the First Judicial District of Wyoming Territory, and upon the hearing a decree was renderd in favor of the complainant, who is now the appellant. Thereupon the defendant in the District Court appealed from said decree to the Supreme Court of the territory. Upon said appeal a decree was rendered dismissing the cause.

[Record, page 47.]

From said decree the complainant in said suit appeals to this court.

The complainant's case as stated in his bill (pages 1 and 2 of Record) is substantially this:

That on the 11th day of April, A. D. 1873, the

complainant and defendant, being copartners in the business of stock raising in Albany County, Wyoming Territory, mutually agreed to dissolve said copartnership, upon the following terms: That said appellant, Ivinson, should assign and convey to the appellee, Hutton, all of his (Ivinson's) rights, title and interest in said partnership and the property thereof; and that in consideration therefor the appellee agreed to repay to Ivinson all sums of money which Ivinson had advanced on account of the said copartnership, after deducting therefrom such sums as he had already received to his own use, and that Hutton should also pay to said Ivinson for the use of the moneys so advanced by him and for his services the further sum of five thousand dollars, and should also pay or secure the payment of all debts or liabilities due and owing by the copartnership.

The bill of complaint further alleges that neither of the copartners were informed as to the state of the copartnership accounts, and that neither of them undertook to ascertain from the books and papers what would be due and payable from Hutton to Ivinson under the contract made, but that both parties agreed to leave the ascertainment of that matter to one A. G. Swain, the clerk and bookkeeper of the copartnership, and that said Swain represented that the amount which would be thus due Ivinson from Hutton, under their contract, was $47,039.54.

The bill further alleges that both parties, supposing said sum to be the correct amount, executed and delivered between each other all the papers necessary to perfect the agreement which had been made respect-

ing the dissolution of the copartnership, but that on the evening of the same day the said clerk, in posting up the partnership accounts, and closing the books of the firm discovered an error in the footing as before furnished to the parties and by them used in drawing up the papers for a dissolution of the firm, which error amounted to $4,036.12, and that the true balance due Ivinson under the agreement was $51,075.66 instead of $47,039.54, and that said Swain at once notified the parties of said mistake, upon which Hutton agreed that he would re-examine the accounts and rectify all mistakes found therein and would make it all right, if he had not already done so.

The bill further alleges that the defendant Hutton refuses to correct the alleged mistake, and the bill therefore prays "that any account may be taken by and under the decree and direction of this hon. court so as to ascertain the exact and just amount due the plaintiff by the defendant on account of their late partnership business, in accordance with the terms of their dissolution aforesaid, and that the agreements, releases and other writings executed by this plaintiff and delivered to the defendant under the mistake and error above set forth may be corrected, amended or canceled, according to the fact and truth of the case * * * and that the defendant may be decreed to pay to your orator said sum of $4,036.12, with interest thereon according to the terms of their said agreement for a dissolution of partnership, and that the defendant may be compelled by the decree of this hon. court to perform specifically the agreement he made with the plaintiff and pay him the just

and true amount intended to be included in their terms of setttlement, and that your orator may have such other or further relief as may be just."

To the bill of complaint thus substantially set forth the defendant demurred.

[See Record, p. p. 4–5.]

Thereupon the complainant amended his bill by striking therefrom all allegations showing that it was a part of the contract of dissolution that if any errors were made in ascertaining the amount that would be payable to Ivinson by Hutton they would mutually correct the same.

[See Record, page 5.

To the bill as thus amended the defendant again demurred.

(See Record, page 6.)

Which last demurrer was overruled by the court on September 16th, 1873, and the defendant was ordered to answer on the 17th of September, 1873, to which rulings of the court the defendant excepted.

[See Record, page 44.]

The defendant, upon the order of the court, then filed his answer on the 17th of September, 1873

[See Record, p. p. 7–8–9–10–11.]

Said answer admitted that the parties on the 11th of April, 1873, agreed to dissolve the copartnership existing between them, and further admitted that all papers, conveyances, &c., necessary to carry out the agreement were executed and delivered between the parties, but denied that the copartnership was to be dissolved upon the terms alleged in the bill; the answer further admitted that by the terms of the agree-

ment for the dissolution of the copartnership, Ivinson was to convey to the defendant, Hutton, all of his (Ivinson's) interest in the copartnership, and that in consideration therefor said Hutton promised said Ivinson to pay, or secure to be paid to him, the sum of $47,039.54 and in addition thereto to pay, or secure the payment of, all the debts and liabilities of the partnership and hold the said complainant wholly safe and indemnified against all said partnership debts and liabilities. The answer further alleged that the contract dissolving the partnership and all the terms thereof was in writing and subscribed by the parties and attached a copy of said written contract marked "Exhibit A."

[See Record, pages 6 and 7.]

The answer further denies the allegations the of bill with reference to the alleged mistake in connection with the making of the contract for the dissolution of the copartnership, and generally denies all the allegations in the bill which are inconsistent with the terms of the written contract as shown by "Exhibit A."

Upon the filing of the answer the court appointed Jasan B. Brown a special master in Chancery to take the testimony in the case, and report the same to the court at the next term, with his findings thereon.

[See Record, page 11.)

On Jan. 21st, 1874, the special master aforesaid made a report to the court containing the evidence taken before him in the case and his findings thereon, which report was filed.

[See Record, pages 12 to 39, inclusive.]

On Feb. 10th, 1874, the defendant Hutton filed exceptions to the report of the special master.

[See Record, pages 39 to 41, inclusive.]

On Feb. 16th, 1874, the complainant files a replication to the answer in the cause.

[See Record, page 41.]

This replication was allowed to be filed upon an order of the court made Feb. 17th, 1874.

[See Record, page 75.]

To this order of the court the defendant excepted.

[See page 75 of Record.

On March 16th, 1874, the court confirmed the report of the special master, to which order in so confirming said report the defendant Hutton excepted.

On March 17th, 1874, the court rendered a decree in said cause which will be found on pages 45 and 46 of the Record.

The decree in substance adjudges that the contract for the dissolution of the copartnership between the complainant and defendant, together with all the other papers, instruments, agreements, notes of hand and mortgages made and executed in pursuance of the contract of dissolution, be reformed and corrected in accordance with the finding of the special master, and that a certain note given by Hutton to Ivinson in part settlement of the whole amount to be paid by Hutton to Ivinson, and dated April 11th, 1873, be reformed and corrected so as to contain a promise to pay the sum of $17,618.66 instead of $13,582.54 as it was executed between the parties, and that the condition of a certain mortgage given to secure the payment of the said note be reformed and corrected so as to secure

the payment of the said note as reformed and corrected. The decree also provides that the defendant pay all costs.

The cause being afterwards appealed to the Supreme Court of Wyoming Territory and heard in that court, it was ordered that the bill of complaint be dismissed.

[See Record, page 47.]

The opinion of said Supreme Court of Wyoming Territory will be found in the

[Record, pages 47 to 50, inclusive.]

From this decree an appeal was taken by the complainant Ivinson to this court.

POINTS.

1. The Supreme Court of Wyoming, in disposing of this case was controlled to some extent by questions of practice prevailing in the courts of that Terriry, one of which related to a so-called amendment made to the original bill of complaint by a simple erasure of an allegation in the bill, the effect of which was to give to a court of law jurisdiction to afford relief by an action of assumpsit for the breach of a contract. Upon this point the court below says:

"The amendment to the bill being made by a simple erasure of the allegation which gave jurisdiction to a common law court, we think was not such an alteration as changed the jurisdiction from a court of law to that of a court of chancery; hence if the plaintiff had his remedy in a court of law the defendant's second demurrer should have been sustained for want of jurisdiction in a court of equity."

(See opinion of Fisher, Chief Justice, page 49 of Record.)

Under the Laws of Wyoming Territory the bill of complaint in a chancery case must be verified. The law is as follows:

"Sec. 668. The bill of complaint and the answer thereto, except when the affidavit to the answer is expressly waived by the bill, shall be verified by the affidavit of the party filing the same, or by his agent or solicitor. * * * * * * * "

[See The Compiled Laws of Wyoming, page 123.]

Upon the subject of amendments to pleadings in chancery the law of Wyoming is as follows:

"Sec. 667. Amendments of pleadings may be allowed by the court upon motion, and notice to the adverse party or his solicitor, either by a new engrossment of the pleadings containing the matter of the amendment, or when the adverse party shall consent thereto in writing by an interlineation of the amendments."

[The Compiled laws of Wyoming, page 122.]

It appears that the complainant's original bill of complaint was properly verified by his affidavit. As thus drawn, however, it appears to have contained allegations which ousted the jurisdiction of chancery. He was permitted generally to amend. Instead of amending as required by the chancery code in the Territory by motion and notice to the adverse party, and by a new engrossment of the bill or obtaining the written consent of the adverse party to amend by an interlineation, the complainant, by an adroit erasure of some of the allegations of the original bill which he had already sworn to and found damaging to his case, undertook in that way to frame an amended bill

of complaint to which he of course made no verification.

The Supreme Court of the Territory reprobates such a practice and held that a complainant could not by such an artifice evade the positive requirements of the code, and so held that the defendant's second demurrer to the bill of complaint should have been sustained, and the bill itself dismissed.

This was a pure question of practice arising under the local law, and this court will not reverse or overturn the action of the courts of Wyoming upon a question of practice.

(Mandeville vs. Wilson, 5 Cranch 15; Marine Co. vs. Hodgson, 6 ib 206; Walden vs. Craig, 7 Wheaton 576; Wright vs. Hollingsworth, 1 Peters 165; U. S. vs. Buford, 3 ib. 12; Schuchard vs. Allen, 9 Wallace 371; Freeborn vs. Smith, 2 ib. 160; City vs. Babcock, 3 ib. 240; Cheang Kee vs. U. S., ib 320; Deery vs. Crey, 5 ib. 795; Sheets vs. Selden, 7 ib. 416; Avendana vs. Gay, 8 ib. 376; Insurance Co. vs. Weide, 9 ib. 677; Quickstep 9 ib. 665; Wiggins vs. Burnham, 10 ib. 129; Cook vs. Burnly, 11 ib. 672.)

2. Another question of practice which appears to have been controlling with the Supreme Court of Wyoming related to the action of the District Court in compelling the defendant to answer to the so-called amended bill of complaint the day after the amended complaint was filed.

The action of the District court in this particular was not only clearly but grossly erroneous. The law regulating this subject is as follows:

"A defendant shall plead to an amended bill on or

before the fifth Monday after service upon him or his solicitor, of notice of the filing thereof.'

(See The Compiled Laws of Wyoming, pages 122–3, latter part of sec. 667.)

The Supreme Court of Wyoming clearly had a right to determine these questions of practice for the government of the District Courts of the Territory, and having based its judgement in the case in part, at least, upon the failure of the appellant to conform to the practice required by the local law, this court will not interfere with the judgement.

3. The record shows that when the evidence in the case was taken by the special master the complainant had filed no replication in the case.

The case should have stood for hearing, therefore, upon the bill and answer.

It may be urged, however, that the defendant should have raised this question at the time application was made to refer the case to a special master, and that having failed to make the objection then, the point is waived. But the facts are that the answer in the case was filed on the 17th of September, 1873. By the law of the Territory the complainant was then entitled to all the time up to the second Monday thereafter to file his replication. The defendant could not, therefore, object to a reference to take the evidence on the ground that there was no replication in the case, because such objection would then have been premature. It could not be known to the defendant at that time that the complainant would not file a replication within the time permitted him to do so. When, however, the special master

proceeded to take the evidence, it was the 17th of December, 1873.

[See Record, page 14.]

At this time no replication had been filed, although the time for doing so had long since expired. The defendant, therefore, finding that the complainant had filed no replication, now objected to the taking of evidence, which was the first opportunity presented to properly object.

[See Record, page 14.]

The practice act of the Territory in reference to this question is as follows:

"Replications shall be general and shall be filed on the second Monday after the filing of the answer, or plea of the defendant, and thereupon either party may enter in the appearance docket the name of the master before whom he will take his testimony, and may proceed therein according to law."

"Sec. 665. After replication is filed the cause shall be deemed at issue. On default of filing such replication within the time required in the last preceeding section, the cause may be set for hearing on bill and answer, unless the court shall otherwise direct.

[The compiled laws of Wyoming, secs. 664–665, page 122.

4. Again the complainant in this case proceeded upon an entire misconception of the powers of the special master in the case under the laws of the Territory. The master, instead of confining himself to the mere ministerial act of taking the testimony of the parties and reporting it to the court, assumed the prerogatives of a judge or chancellor in the case. The

Supreme Court of the Territory declares the action of the master in this respect wholly unwarranted.

"The record shows that the special master not only heard and reported the evidence to the court, BUT THAT HE PASSED JUDICIALLY UPON VARIOUS QUESTIONS WHICH AROSE DURING THE HEARING, AND PRESENTED A FINDING UPON THE FACTS PROVED. THIS WAS BEYOND THE POWER OF THE SPECIAL MASTER BY THE PROVISIONS OF THE CODE OF WYOMING. The duties of a special master are to simply take the testimony and report the facts to the court for its action, and not to return his findings upon the evidence."

[Opinion of Fisher, Chief Justice, Record, page 49.]

Section 686 of the chancery code of the Territory prescribes the powers of a master in chancery, and a reading of it will show that a master has no judicial or other powers than to merely write down the evidence offered by the parties, and return the same to the court.

Sec. 687 of the same code authorizes the appointment of a special master, but does not confer upon him any other power than that possessed by a regular master.

5. After the evidence in the case had been taken and reported to the court, the court permitted the complainant to file a replication, to which order of the court in so permitting the plaintiff to file a replication the defendant at the time excepted.

[See Record, page 45.]

The effect of a failure to file a replication in a case so as to get the case properly at issue was somewhat

considered in the case of Clements vs. Moore, 6 Wallace 310. In that case, however, a paper purporting to be a replication was filed, but it was alleged to be so defective as not to be a replication. This court held, however, in that case that the replication was sufficient, and held, moreover, that the objection could not be considered because it was not made in the court below.

Here, however, the case is different, as there was no replication of any kind in the case when the complainant proceeded to take his testimony, nor at any time until after the evidence was reported to the court, and the defendant promptly objected to the taking of evidence in the then condition of the pleadings, and took an exception afterwards to the order of the court in permitting a replication to be interposed.

[See Record, pages 14 and 45.]

The Supreme Court of Wyoming seems to have considered the action of the District Court in this respect as erroneous (see opinion page 49 of Record) and is sustained in its view not only by the chancery practice act of the Territory, but by authority.

[See Daniels' Chancery Pleading and Practice, page 826; Childs vs. Barr, Clark's R (Iowa) 432; Rogers vs. Mitchell, 41 N. H. 154; Pierce vs. West, 1 Peters C. C. R. 531; Pickett vs. Chilton, 5 Minn. 467; Scott vs. Clarkson, 1 Bibb 277.]

6. Another reason why this court cannot interfere with the decree of the Territorial Supreme Court is found in the fact that for some reason the record does not contain all the evidence in the case. On page 39

of the record it appears from the master's report that plaintiff (complainant) put in evidence the dissolution contract AND MORTGAGE. The master's report, however, contains neither of these documents thus put in evidence. Attached to the answer in the case will be found what is called the dissolution contract (see pages 6 and 7 of record) but nowhere do we find the mortgage which was put in evidence. This was the very mortgage which the District Court, by its decree, ordered to be corrected and reformed. It will thus be seen that it is an important item of the evidence. With only a part of the evidence before it this court will scarcely venture to overturn the judgment of the court from which this cause comes, and to pronounce a decree with an important part of the evidence omitted from the record.

Enough appears in the evidence to show that a large number of papers and instruments were executed between complainant and defendant in carrying out the contract for the dissolution of the copartnership between them. The decree in the case as entered up by the District Court directs that "the contract for the dissolution of the copartnership between said Hutton and Ivinson, together with all the other papers, instruments, agreements, notes of hand and mortgages, made and executed by them at that time and in pursuance of said agreement to dissolve, be reformed and corrected in accordance with the finding of said special master in his said report."

Now, in looking through the record it will be seen that it contains no evidence whatever showing what "the other papers, instruments, notes of hand and

mortgages" were. How, then, can this court decree in what particular all said papers shall be reformed? How could any court determine that question in the absence of evidence showing what the terms of the instruments were? Take for instance the note of hand, a copy of which, in its reformed condition, is set out in the decree.

[Record, page 42.]

In vain will we look through the testimony in the case to see that said note, as executed, was introduced in evidence, or any evidence given to show what the terms of the note, as originally executed, were. And yet we find the court decreeing that the note shall be reformed as shown by the decree, without any evidence as to how it was first executed.

7. But one of the more serious difficulties with the complainant's case is and always has been that his bill of complaint never stated any such case as entitled him to any relief whatever. His bill was totally defective, and as an attempt to state a case which would authorize any court to correct and reform a written contract, was a complete failure, so much so that the Territorial Supreme Court for that reason, directed the cause to be dismissed.

The opinion of the Supreme Court of the Territory upon that head (see record, page 50) is as follows:

"The plaintiff's bill, allowing that a court of equity had jurisdiction, is defective in the fact that the action is based upon the alleged wrongful statement of an account between the parties; therefore the first prayer of the bill should have been to have the statement opened, with leave to surcharge, falsify, or CORRECT IN

SOME PARTICULAR, AND THE PARTICULAR ITEM OR ITEMS OF THE ACCOUNT TO BE AMENDED SHOULD BE POINTD OUT SO THAT THE CHANCELLOR MIGHT READILY SEE WHEREIN THE STATEMENT WAS DEFECTIVE. NONE OF THESE THINGS ARE PRAYED FOR IN THE PLAINTIFF'S BILL."

The doctrine thus announced as to the necessity of particularity and certainty in a bill of complaint seeking the reformation of a written contract is fully sustained by this court.

"The party alleging the mistake must show exactly in what it consists, and the coarection that should be made."

[Hearne vs. Marine Ins. Co., 20 Wal. 490.]

In the case just cited this court prescribes two requisites for a bill of complaint in an action to reform a written contract:

1. It must be alleged in the bill EXACTLY in what the mistake consists—and
2. The correction that should be made.

Tried by this standard the bill of complaint in this case does not meet either of the requirements above set forth.

The bill, after alleging that the clerk of the parties, A. G. Swain, handed them on a slip of paper the figures $47,039.54 as the sum or amount which Ivinson was to receive from Hutton for Ivinson's interest in the partnership, proceeds further and makes this allegation:

"On the evening of said day, when their said clerk was posting up said partnership accounts, and closing up the books of the firm, he discovered an error in the

the footing as given your orator and defendant * * * * amounting to the sum of four thousand and thirty-six dollars and twelve cents, and that instead of $47,039.54 as given by him the just and true balance due your orator from said defendant was $51,075.66."

How can anyone tell from this allegation in what PARTICULAR the alleged error or mistake consisted? Was it a mere mistake in the addition of numbers? The bill does not say so, however the fact may have been. But if it were so, why does not the bill state and show what the numbers added were, so that this court can see the mistake? We might suppose that the alleged mistake occurred in the mere matter of the addition of numbers from the fact that the bill alleges a mistake "in the footing," and says nothing of any mistake in the several amounts or sums which, aggregated, constituted the footing; but when we turn to the evidence that inference is entirely overborne.

The complainant Ivinson was not able to state the nature of the alleged mistake. His evidence is found on page 25 of the record, and is as follows:

"Q. 17. State particularly the nature of the mistake?

Ans. I cannot state particularly the nature of the mistake.'

The only remaining evidence in the record upon this point is the testimony of A. G. Swain, and is found on page 18 of the record, and is as follows:

"The error was made by taking the amount paid by Ivinson to Creighton from the books of the bank instead of the books of the partnership. It was caused

as follows: At the time of buying into the partnership by Ivinson, he (Ivinson) gave his check on the Omaha National Bank, of Omaha, for $15,000.00 in favor of Edward Creighton, or order. Upon learning of the transaction I charged up the amount of $15,000.00 to Edward Ivinson's stock accounts, which was an account I opened at that time upon the books of the bank as amounts were paid by the firm of Hutton & Co. for beef sold to them by Hutton & Ivinson. Ivinson's half was paid directly to him (Ivinson), and credited on the stock account of said Ivinson on the books of the bank, until the amount was reduced to $10,963.88, when said stock account of $10,963.88 was put into a note by said Ivinson in favor of the bank, and at the time of settlement or making up of the amounts due by said Hutton to said Ivinson, I, instead of taking the amount of $15,000.00 as originally paid into the partnership by Ivinson, took the amount of $10,963.88, being the amount of the note due by Ivinson to the bank The stock account I here speak of was confined to the $15,000.00 Ivinson put into the firm of Hutton & Ivinson in the first instance, and the credits received by Ivinson."

While this evidence is not altogether clear, yet it is quite explicit enough to show that the alleged error in the sum ascertained to be due to Ivinson from Hutton on account of the advances made to the firm by Ivinson, and fixed by the terms of the dissolution contract, did not exist "in the footing" of the account at all, or in the addition which Swain made. On the contrary, if this evidence shows anything to be depended on, it shows that the mistake occurred in one of the items which were to be added together to give the total amount to be paid by Hutton to Ivinson, and not in the addition or "in the footing" at all. If

the items were right the footing was right. But there is nothing in the bill of complaint either asserting or implying that the mistake occurred in a particular item or items of any account or transaction—much less any attempt to specify in the bill "exactly in what the error consists," as required by this court in the case of Hearne vs. Marine Insurance Co., 20 Wallace 490, before cited.

Much less does the bill allege, or the evidence show in what particular the correction of the written contracts should be made, but as that matter may be more fully discussed under the next point to be considered, it is now passed. Before passing from this point the attention of the court is respectfully invited to the evidence last quoted as bearing upon the question as to how the sum total of the moneys Hutton was to pay to Ivinson, under the dissolution contract, was made up.

From this evidence it would appear that at one time Ivinson advanced $15,000.00 for the benefit of the firm, and that Swain had charged that amount up to stock in an account opened on the books and designated "Stock Account," and had of course credited Ivinson with that amount. It seems further that a firm known as Hutton & Co. had been purchasing beef from the firm of Ivinson & Hutton, and as payments were made for the beef so purchased, one half of such payments were turned over to the complainant Ivinson as his share, and charged to Ivinson and credited in the said "Stock Account.." Payments were made to Ivinson and credited upon said "Stock Account" until the balance of that account was $10,-

963.88. Now as Ivinson in his contract with Hutton was to be paid only such sums as he had advanced to the firm, LESS ALL SUMS WHICH HE HAD ALREADY RECEIVED TO HIS USE, it is thus conclusively established by the complainant's own evidence that the $10,963.88 was the proper amount to be charged to Hutton from that account, instead of $15,000.00, as is now claimed in making up the total sum that Hutton should pay to Ivinson upon the complainant's theory of the case and version of the contract.

The bill is also radically defective in failing to allege directly and positively any error or mistake in any of the papers or instruments or contracts sought to be corrected and reformed. There is no allegation of any kind in the bill as to any mistake in any of the written contracts executed between the parties. The bill does allege that the clerk of the firm of Hutton & Ivinson, on the evening of the 11th of April, 1873, in closing the books of the firm, discovered an error in the footing as given to the parties some time before, but when so grave a matter as the correction of written contracts on the ground of mistake in their execution is sought through the courts, it surely is not sufficient merely to allege that some third party discovered a mistake, and stop anywhere short of alleging the mistake in positive and direct terms. As already shown, the party complaining of a mistake in such a case must not only allege the mistake, but show exactly in what it consists, and the correction that should be made.

In the bill in this case there is really no averment, in legal contemplation, that any mistake was made by

the complainant and defendant in respect to the contracts made between them. The allegation that the clerk discovered a mistake is certainly not equivalent to such averment, for such a rule of pleading would substitute the opinion of a third person for that positive and direct allegation which the law of pleading requires.

[See Story's Equity Pleading, secs. 251–257–290.]

8. There remains still to be considered the question as to whether or not the complainant, upon his bill of complaint and the evidence in the case, has made such a showing as entitled the court hearing the case to grant him the relief which he sought and obtained, or any relief which would be proper under the pleadings. We insist that this question must be answered negatively.

This court has clearly stated in respect to the evidence in a case like this—alleging a mistake in a written contract, and asking for the reformation and correction of the same—that the evidence must be such as to leave no reasonable doubt upon the mind of the court as to the exact mistake which has been made, and the correction which should be made.

[See Hearne vs. Marine Insurance Co., 20 Wallace 490.]

Other authorities establish the same point.

See Beaumont vs. Bramley, 1 Turner and Russell, 41–50; Marquis of Breadalbone vs. Marquis of Chandas, 2 Mylne & Craig 711; Fowler vs. Fowler, 4 De Gex and Jones, 255; Sells vs. Sells, 1 Drewry and Smales 42; Loyd vs. Cocker, 19 Beavan 144.]

The complainant's bill, in setting out the terms of

the contract as really entered into between the parties, alleges that the defendant Hutton stipulated several things:

1. That Hutton should pay Ivinson all moneys Ivinson had advanced the firm, less all sums which he had already received.

2. That Hutton should pay Ivinson a bonus of $5,000 for Ivinson's services and for the moneys so advanced, and

3. That Hutton should pay or secure the payment of all the debts or liabilities due and owing by such partnership.

Keeping in mind what the bill alleges, let us see what the complainant's own evidence is as to what Hutton's obligations were, as established by the dissolution contract.

A. G. Swain, the principal witness for the complainant, testifies, as shown by page 15 of the record, that Hutton, in consideration of the conveyance to him by Ivinson of his interest in the partnership, undertook and promised Ivinson as follows:

1. That Hutton agreed to pay Ivinson all sums of money which Ivinson had advanced to the partnership.

2. That Hutton agreed to pay all such sums of money as had been borrowed from the bank of Ivinson by Hutton & Ivinson.

3. Hutton was to pay all such sums of money as had been borrowed from said bank by himself.

4. That Hutton was to pay an amount owing to the said bank by a concern known as Harper & Co.

5. Hutton was to pay Ivinson, as a profit or bonus,

$5,000 for Ivinson's interest in said partnership, and

6. Hutton agreed to pay all outstanding indebtedness of the partnership, and indemnify Ivinson against the payment of said partnership debts.

[See Record, page 15.]

From this it will be seen that, according to Swain's testimony, the contract as actually entered into by the parties was quite a different thing from the contract as alleged in the bill of complaint, as well as being quite different from the contract as actually reduced to writing. According to Swain, Hutton assumed at least two, and perhaps three, distinct and substantial obligations which are not alleged in the bill.

Nor does the complainant Ivinson, in his testimony, agree with the allegations of his bill much, if any, better than Swain. Ivinson's evidence was that

1. Hutton agreed to pay Ivinson all the money he had put into the partnership.

2. Hutton agreed to pay all the expenses the firm had incurred.

3. Hutton agreed to pay Ivinson all the money he personally owed Ivinson.

4. Hutton agreed to pay Ivinson a note of Harper & Co.

5. Hutton agreed to straighten up all the accounts of the firm and all his (Hutton's) individual accounts.

6. Hutton agreed to pay all the debts owing by the firm, and $5,000 for Ivinson's investment in the business.

After making all allowances for the manner in which the complainant expresses himself, we are still compelled to find from his testimony that the contract

was quite a different thing from what the bill of complaint alleges, and what the writing itself shows.

Another witness called for the complainant was J. W. Kingman. His evidence will be found on pages 27 and 28 of the record, and an examination of it shows that this witness is as widely at variance with the allegations of the bill as to what the contract was as either of the other two witnesses. Besides this witness' evidence is affected by a consideration which ought to have great weight in enabling the court to determine its value. This witness was the party employed to draw the dissolution contract, and is the person who actually did draft it, and in his testimony on page 27 of the record he says:

"Mr. Hutton, Mr. Ivinson, Mr. Swain and Col. Downey came to my office together, and talked over the terms of the agreement and the stipulations to be included in their settlement and dissolution. I TOOK DOWN A CAREFUL MEMORANDA OF ALL THE ITEMS MENTIONED."

Now the question must at once occur to every one, how is it possible, if Mr. Kingman took down a careful memoranda of the terms of the contract, AND THEN DREW THE CONTRACT THEREFROM, that he should have drawn the contract so widely variant from the contract as agreed to, and then should again have drawn the bill in this case so widely variant from what his own testimony seems to show?

Attention has now been called to all the evidence offered by the complainant as to what the actual contract was between complainant and defendant as to the dissolution of the partnership.

No one can fail to notice the serious discrepancy existing between the allegations of the bill and the evidence upon the point just discussed.

As the Supreme Court of Wyoming well says in its opinion dismissing the case:

"The plaintiff comes into court asking the correction of the statements specified in the contract, but proceeds to set up and prove a contract entirely different from the one on which the action is based."

[See opinion, page 50 of Record.]

In view of the very material discrepancy shown to exist between the complainant's ALLEGATA and PROBATA could the court do otherwise than dismiss the bill?

Thus far the complainant's evidence alone as to the terms of the contract for a dissolution of the partnership between complainant and defendant has been adverted to.

The defendant, both by his answer and proof, adheres to the written contract shown on pages 6 and 7 of the record as being the contract that was actually and finally agreed upon between the parties, and utterly denies that any mistake was made in drawing up the contract, as he (Hutton) understood it. That there were negotiations prior to the signing of the contract, in which various matters and things were mentioned as a basis upon which terms could be agreed upon Hutton does not deny, but the defendant affirms that all these matters were merely preliminary to the parties getting to an understanding, and that all such negotiations and talks were afterwards finally absorbed in or superseded by the written contract, and that the latter was the final depository of the par-

ties' mutual wishes—or at least that it contained the evidence of what the defendant assented to.

The claim of the defendant as made in his answer, is fortified by the following considerations:

1. The written contract itself, which, in law, is presumed to contain the whole of the final agreement of the parties.

"When parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous COLLOQUIUM between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

[1 Greenleaf on Evidence, sec. 275.]

Although the doctrine as thus stated would not be applied in a case where an application is made to correct a written contract on the ground of fraud or mistake, to the extent of holding that the writing is the CONCLUSIVE evidence of the intentions of the parties, still it must be conceded that even in a case like the one at the bar, the principle as thus stated by Greenleaf must have great weight in any case where there is any conflict of evidence as to whether any mistake occurred. Indeed, this principal must have been in the mind of this court when it declared, in Hearne vs. Marine Ins. Co., (Supra) THAT THE EVIDENCE MUST BE SUCH AS TO LEAVE NO REASONABLE DOUBT UPON

THE MIND OF THE COURT AS TO WHAT THE ALLEGED MISTAKE IS, AND THE CORRECTION THAT SHOULD BE MADE.

2. The defendant Hutton testifies positively that the written contract contains no mistake, and that, on the contrary, it contains the contract as it was actually and finally agreed upon.

[See Hutton's testimony, pages 31 and 32 of Record.]

This testimony is further corroborated by the circumstances that as Hutton undertook to pay or secure the payment of, the total sum which had been advanced to the firm by Ivinson, it was indispensable that Hutton should know what amount had to be thus provided for, in order that he might make his arrangement to discharge the heavy obligation which he thus assumed.

3. Col. Downey's evidence, found on page 37 of the record, shows positively that at the meeting at Judge Kingman's office, where the writings evidencing the terms of the dissolution were being prepared, no question was raised by the complainant or his friends as to the correctness of the amount of $47,039.54. A question was raised by Col. Downey himself as to that matter. His testimony, given VERBATIM, will, however, best show what the facts were:

"I heard no question raised as to the amount of $47,039.54 being the correct amount except by myself. I think I asked Ivinson or Mr. Swain if the amount of $47,039.54 was correct. Mr. Swain answered in substance that it was correct. The questions raised by Mr. Ivinson were in reference to the different payments making up that sum, he wanting more

money paid down than Mr. Hutton was able to pay."

[See Record, page 37.]

The testimony of Col. Downey brings into prominence a feature of the case which it is important to consider, namely: That as a part of the whole transaction by which Ivinson transfered his interest in the partnership to Hutton. the parties had to determine how the money payable to Ivinson had to be paid, or secured to be paid. Hutton, it appears, could not pay the whole of the $47,039.54 down at the time of the trade. It was necessary therefore that the parties should agree as to how Hutton should SECURE the payment of the remainder as he had agreed to do. It was necessary that Ivinson should determine what security he was willing to take, and for Hutton to determine what security he was able and willing to give. It was necessary that the parties should agree upon this question before any trade could be consummated, because the payment of the money going to Ivinson, or securing its payment, was to be contemporaneous with, and indeed a part of the trade itself.

By reference to page 7 of the record it will be seen just how the parties settled the matter of the payment. The schedule of payments made and to be made by Hutton is found at the foot of the contract, and shows that Ivinson received some cash and various orders and securities, either as cash or sufficient security for the respective amounts expressed upon the face of the orders or securities. After this, had all been arranged satisfactorily to the parties, there yet remained, however, the further sum of $13,582.54 to be provided for by Hutton in order to make up

the full sum of $47,039.54. From the schedule before referred to and shown on page 7 of the record it appears that the $13,582.54 was provided for by a note due on or before Sept. 1st, 1873, and from the terms of an agreement between the parties set out on pages 26 and 27 of the record we learn that this note was secured by some kind of a mortgage upon real estate.

This chapter in the history of the transactions between the parties is important, and should be borne in mind because it shows this: That the amount which Hutton was to pay or secure to be paid to Ivinson as a repayment of his investment, and as a profit or bonus had to be FIRST ascertained and fixed upon between the parties BEFORE they could arrange as to the manner of its payment.

That sum or amount having been agreed upon and fixed at $47,039.54; the parties then arranged as to the manner of its payment.

Who can say from the evidence in the case how, if the amount to be provided for had been fixed at a sum $4,036.12 in excess of the $47,039.54, such excess of $4,036.12 would have been provided for? Who can say from the evidence that the $4,036.12 would ever have been provided for at all? Who can say that the negotiations would not have failed and fallen through, if the amount which Hutton was required to pay Ivinson had been fixed at $51,075.66 instead of $47,039.54? Is anybody warranted in saying that for this excess of $4,036.12 Ivinson would have consented to have it included in the note which was to be paid on the 1st of Sept., 1873? Can anybody say that Hutton would have consented to have that sum included in that note?

The parties might have agreed that the $4,036.12 should be included in the note which was to be paid Sept., 1st, 1873, if the matter of providing for the payment of any such sum had been at all in the minds of the parties. The fact is that such a contingency was not in the minds of the parties. They both supposed they had already provided for the payment of all that was to be provided for. Hence they never agreed between themselves that Hutton should give Ivinson a note for $17,618.66, to be paid Sept. 1st, 1873, drawing interest at the rate of two per cent. per month until due, and three per cent. per month afterwards, for the very good reasons that Ivinson did not think any such sum was due him, and Hutton did not think he owed or would owe that sum. The fact is that the District Court before which this cause was heard, in entering a decree changing the $13,582.54 note to a note for $17,618.66, and changing a mortgage in its condition so as to secure a note for the last named sum, assumed a power which no court possesses. It proceeded to make for the parties a contract which they had never made for themselves.

The court undertook to say that if the said parties had found, upon the basis of the general propositions for a dissolution of said copartnership and transfer of Ivinson's interest to Hutton, that it would be necessary that Hutton should pay to Ivinson the sum of $51,075.66, the trade would have been consummated all the same, and that the before mentioned sum of $4,036.12 would have been included in the before mentioned note, payable Sept. 1st, 1873. Surely it will not be pretended that the parties ever made any

agreement to that effect. The record will be perused in vain for any such agreement between the parties.

It may be thought that the parties would have came to such an agreement if they had known on the 11th or 12th days of April, 1873, that any such contract would ever be necessary, but the courts are not to deal with this question as necromancers, but as courts, whose functions are to ascertain, not what the parties might or should have done, but what they actually did do—what contract they actually did make.

Is there a particle of evidence in the record showing or tending to show that if Ivinson had found that he should have over four thousand dollars more in the trade he was making he would have been content to take Hutton's note and mortgage for that additional sum? May we not just as well assume that Ivinson would have insisted that the whole or a part of that additional sum should be paid in cash; or, at least, that additional security should be given, for while the security given for the note of $13,582.54 may have been ample, who can say that it would have been ample for a note for $17,618.66? Much less how can anyone say what Ivinson would have thought and agreed to as to that matter? Who can say what Hutton would have thought and agreed to had he found himself required to pay more than $4,000 more for an interest in a business than he supposed it could be obtained for? Happily this court is not required to speculate upon that kind of a case, nor indeed to speculate at all. It can only ascertain what contract the parties actually made between them-

selves, which, through a mistake in expressing it, was not expressed in writing as BOTH PARTIES intended.

The rule is well stated by this court in another case:

"The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding but not for reforming a contract. Where the minds of the parties have not met there is no contract and hence none to be rectified."

[Hearne vs. Marine Ins. Co., 20 Wallace 490–491; Rooke vs. Lord Kensington, 2 Kay & Johnson 753; Eaton vs. Bennett, 34 Beavan 196; Mortimer vs. Shortall, 2 Drury & Warren 372; Sells vs. Sells, 1 Drewry & Smales 42; Bently vs. McKay, 31 L. J. Chancery 709; Baldwin et als vs. Middleberger, 2 Hall 176; Coles vs Bowne, 10 Paige 534; Calverly vs. Williams, 1 Vesly Jr. 211.]

The District Court of Wyoming Territory, in making up its decree in this case, made Hutton, the defendant, party to a contract never entered into by him—nay, worse, it made both the complainant and defendant parties to contracts never entered into by either of them. The Supreme Court of the Territory very properly declared that the province of the courts must be confined to such reformation of contracts as will make them express what the parties intended—and not what they ought to have intended—or would have intended had they anticipated all the developments and wants of the future.

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